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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1211

SAM L. MACCORKLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Sam L. MacCorkle, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered February 28, 1969, in Case No. 12,797, styled United States of America, Appellee, versus Sam L. MacCorkle, Appellant, (A. 1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears in the Appendix hereto (A. 2). The Memorandum Opinion of the United States District Court for the Southern District of West Virginia, relating to the courts rulings on the pre-trial motions of petitioner, defendant therein, appears in the Appendix hereto (A. 6). No written opinion was rendered by the trial court.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the trial court, was entered February 28, 1969. This Court's jurdisdiction is invoked under 28 USC, Section 1254 (1), and by virtue of Rule 19 (b) of the Rules of this Honorable Court.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the District Court's ruling on petitioner's Motion to Dismiss the Indictment on the ground of pre-indictment delay, thereby depriving petitioner of Due Process of Law and a Speedy Trial in violation of the Fifth and Sixth Amendments to The Constitution of the United States of America?

2. Did the Court of Appeals err in affirming the District Court's ruling on petitioner's Motion to Dismiss the Indictment on the ground of post-indictment delay, thereby depriving petitioner of a Speedy Trial in violation of the Sixth Amendment to The Constitution of the United States of America?

3. Did the Court of Appeals err in affirming the District Court's refusal to charge the jury in accordance with petitioner's requested instructions numbers 10, 11, 12 and 13, bearing on the wilful element of the offenses charged in the indictment?

4. Did the Court of Appeals err in affirming the District Court's charge to the jury concerning the wilful element of the offenses charged in the indictment?

5. Did the Court of Appeals err in affirming the District Court's re-instruction of the jury concerning the wilful element of the offenses charged in the indictment?

6. Did the Court of Appeals err in affirming the District Court's refusal to charge the jury in accordance with petitioner's requested instructions numbers 3, 5, 6 and 9?

7. Did the Court of Appeals err in affirming the District Court's ruling in permitting the introduction in evidence of Government's Exhibits 9, 10, 112, 12, 13 and 14?

8. Is the Fourth Circuit's Order of February 28, 1969, supported by applicable principles of law and evidence?

9. Did the Court of Appeals err in affirming the District Court's rulings on all other errors assigned?

STATUTORY PROVISIONS AND RULES INVOLVED

Title 26, Section 7203, United States Code; Title 18, Section 3237, United States Code; and Rule 48 (b), Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Defendant, the former Assessor of Kanawha County, West Virginia, residing in Charleston in the Southern District of West Virginia, was indicted by a Grand Jury in the Northern District of West Virginia, at Elkins, West Virginia, on the 25th day of March, 1966, and charged with the violation of Title 26, Section 7203 of the United States Code in a five count Indictment alleging that he wilfully and knowingly failed to file his personal income tax returns timely for the years 1959, 1960, 1961, 1962, and 1963. The indictment contained a separate count for each of the respective years.

The Court ordered the proceeding transferred to the Wheeling, West Virginia, Division of the United States District Court for the Northern District of West Virginia. The defendant, petitioner herein, appeared, in person and by counsel, before the United States District Court for the

Northern District of West Virginia, at Wheeling, on the 4th day of April, 1966, and moved the Court to transfer the action to the Southern District of West Virginia, the petitioner's place of residence, for further proceedings. The Court took the motion under advisement and informed both counsel for petitioner and the District Attorney that he would advise them concerning the future course of the case after he had time to study the law and authorities thereon. No official action of record was taken thereafter until the 16th day of August, 1967, when counsel for petitioner received a letter from the Clerk of the Northern District advising that the Honorable Eugene A. Gordon, Judge of the United States District Court for the Middle District of North Carolina, had been designated to sit in this matter.

Thereafter, Judge Gordon by letter directed counsel to file all desired motions and pleadings on or before the 28th day of September, 1967. The desired motions and pleadings were filed as directed, and petitioner appeared before Judge Gordon at Wheeling on the 9th day of October, 1967, as further directed. Whereupon, The Court after studying Petitioner's Motion to Transfer, and after having heard the arguments of counsel and reviewing the authorities cited in connection therewith, ordered the matter transferred to the Southern District of West Virginia for further proceedings.

Immediately thereafter petitioner moved the District Court for the Southern District of West Virginia to grant him a speedy trial and to require the Government to proceed with its prosecution without further delay. The Court set the 20th day of December, 1967, for hearing the matters arising on the pre-trial motions filed as aforesaid and, after mature consideration and having heard the arguments of both counsel for petitioner and the Government, ordered the

indictment dismissed because an improperly constituted Grand Jury returned the said indictment.

On the 18th day of January, 1968, petitioner was again indicted by a Grand Jury of the United States District Court for the Northern District of West Virginia, at Wheeling, and on the 31st day of January, 1968, petitioner appeared in person and by counsel at Wheeling and again moved that Court to order the matter transferred to the Southern District of West Virginia for further proceedings. The Judge of that Court, the Honorable Robert Maxwell, immediately ruled thereon and ordered the proceeding transferred.

Petitioner immediately filed in the Southern District, at Charleston, pre-trial motions identical with the ones filed in the former proceedings, and that Court set the 2nd day of April, 1968 for hearing thereon. The Court overruled a majority of petitioner's motions, and set the matter for trial on the 29th day of July, 1968. The Court later filed its Memorandum Opinion, dated April 25, 1968, containing its rulings on said motions. Petitioner was tried on the 29th, 30th, and 31st days of July, 1968, and on the 31st day of July, the jury returned its verdict of guilty on all five counts of the indictment. Thereafter, petitioner moved the Court to set aside the verdict and to award him a new trial, and to arrest judgment on the verdict assigning grounds therefor, which the Court subsequently overruled, and on the 3rd day of September, 1968, the Court imposed sentence upon the petitioner. Thereafter, petitioner appealed to the United State Court of Appeals for the Fourth Circuit, and this petition follows that court's order and opinion entered on the 28th day of February, 1969.

Petitioner's uncontroverted testimony clearly establishes that an Agent of the Internal Revenue Service called upon

him at his home in the month of September, 1964, to inquire whether he had filed personal income tax returns for the years set forth in the indictment, and that petitioner forthwith informed him that he had not filed the same (A. 40). However, the indictment, subsequently dismissed, was not returned by the Grand Jury until the 25th day of March, 1966, some 82 weeks or almost 19 months thereafter. Petitioner appeared to answer the indictment on the 4th day of April, 1966, and moved the Court, in writing, to transfer the proceeding to the Southern District of West Virginia. The Court stated that it would take the motion under consideration, and, after considering the law in that regard, would advise the parties of his ruling (A. 68). However, it was not until the 9th day of October, 1967, after a period of approximately 78 weeks or 18 months, that the Honorable Eugene A. Gordon, United States District Judge for the Middle District of North Carolina, acting Judge for the Northern District of West Virginia, ruled on said motion and ordered the proceedings transferred to the Southern District of West Virginia.

On the 20th day of December, 1967, the Honorable John A. Field, Jr., Judge of the United States District Court for the Southern District of West Virginia, at Charleston, dismissed the indictment on petitioner's motion previously filed on the 28th day of September, 1967, pursuant to Judge Gordon's instruction, on the ground that the Grand Jury that returned the same was improperly constituted.

On the 18th day of January, 1968, a new indictment was returned against petitioner in the United States District Court for the Northern District at Wheeling, and upon the 31st day of January, 1968, the proceeding was again ordered transferred to the Southern District of West Virginia, upon petitioner's motion. Shortly thereafter the petitioner again moved to dismiss the indictment on the ground

that the unreasonable delay in prosecution had deprived him of Due Process of Law and a Speedy Trial in violation of the Fifth and Sixth Amendments to The Constitution of the United States of America, and, pursuant to Rule 48 (b) of the Federal Rules of Criminal Procedure. A hearing was held on petitioner's motions on the 2nd day of April, 1968, and the Court ruled on the same a short time thereafter and filed its Memorandum Opinion (A. 6). The total elapsed time from the instigation of the Government's prosecution against petitioner to the date the second indictment was returned against him totalled 177 weeks or 39 months. The post indictment delay, from the date the original indictment was returned until the Court ruled on the motion to dismiss because of the delay, totalled 107 weeks or 24 months.

The trial of petitioner commenced on the 29th day of July, 1968, and, pursuant to the direction of the Trial Judge, petitioner submitted a list of requested instructions to be considered by the Court in connection with his charge to the jury. Requested Instructions Nos. 10, 11, 12, and 13 related to the wilful element of the offenses charged in the indictment, and were refused by the Court (A. 62). Requested Instructions Nos. 3, 5, 6, and 9, relating to the presumption of innocence, reasonable doubt, and conflict of evidence, were refused by the Court (A. 60). The Court disagreed with petitioner's contentions and theory of the case in this regard, and charged the jury with the law applicable to the case in his belief. Subsequently the jury retired to consider its verdict, but later returned to the Court and requested re-instruction on the wilful element of the offenses charged. Thereupon the Court re-instructed the jury on the element of wilfulness, over petitioner's objection and contrary to his requested instructions.

During the trial the Court permitted the Government, over petitioner's objection, to introduce into evidence Government's Exhibits Nos. 9, 10, 11, 12, 13 and 14, those being income tax returns filed in years prior to those set forth in the indictment.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THERE WAS NO UNREASONABLE PROLONGATION OF THE PRE-INDICTMENT INVESTIGATION OF PETITIONER IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND OTHER COURTS OF APPEALS, AS WELL AS ITS OWN PRIOR DECISIONS.

In order to determine whether the delay was reasonable or unreasonable, the Court must first know the reason or reasons that occasioned it. Moreover, counsel believes that the various Courts are unanimous in holding that when an issue of delay of some magnitude is raised, the burden of proof is upon the Government to justify it. In the instant case the Government not only failed to sustain its burden of proof in this regard, it admits that it does not know the reasons for the delay, if any. The only explanation offered for the pre-indictment delay in this case is the Assistant District Attorney's statement to the Court, made in reply to this issue when referring to the investigation conducted by the Internal Revenue Agent. * * * "He couldn't drop all of his work and start on this one particular case. These agents have many duties and many cases to work and they work them as best they can under the circumstances. This is the only explanation I can give for the delay prior to indictment." (Tr. 50-4/2/'68). Thus, it is clear that no explanation whatsoever has been made for pre-indictment delay, and no showing that it was reasonable.[1]

[1]This appears to be particularly true in light of the Court's statement in the case of Lenske vs. U. S., 66-2 U. S. T. C. 9686, wherein the government, as in the instant case, resisted the defendant's motion for a bill of particulars. The trial judge said, "The government is the strongest litigant in the world. You have got the FBI and all the government agencies available to you. You represent the strongest client in the world."

Pre-indictment delay was thoroughly gone into the case of Nickens vs. United States, 323 F. 2d 808, wherein the defendant was convicted on a narcotics charge. The Court of Appeals, D. C., said:

"(1) (1) Appellant's claim relating to the delay between the date of the offense and the commencement of the criminal prosecution is not covered by Rule 48 (b) of the Federal Rules of Criminal Procedure. Harlow vs. United States, 301 F. 2d 261, 266 (5th Cir.), cert., denied, 371 U. S. 814, 83 S. Ct. 25, 9 L. Ed. 2d (1962); Hoppengarner vs. United States, 270 F. 2d. 465, 469 (6th Cir. 1959); United States vs. Hoffa 205 F. Supp. 710, 720-721 (S. D Fla. 1962), or by the Sixth Amendment, but rather it relates to the running of the applicable statute of limitations." * * *

Circuit Judge Wright, in a concurring opinion filed therein, details the position taken by defendant in this proceeding.

* * * "Delay in bringing a complaint may violate Sixth Amendment rights. This Court, without dissent, said only last year: "(T) he constitutional guarantee protects against undue delays in presenting the formal charge as well as delays between indictment and trial. The Supreme Court's affirmance of Judge Thomsen's ruling in Provoo, Infra. seems to have settled the point. See also our opinion in Taylor, infra. In a non-capital case, it is true, mere delay in presenting the charge will rarely work a deprivation of constitutional rights, for permissible time in that instance is normally governed by the statute of limitations. Yet, if the delay is 'purposeful or oppressive,' Pollard vs. United States, 352 U.S. 354, 361, 77 S. Ct. 481, 1 L. Ed. 2d 393, even an indictment within the limitation period may come too late to square with the Sixth Amendment." Mann vs.

United States 113 U. S. App. D. C. 27, 29-30, N. 4, 304 F. 2d 394, 396-397, n. 4 (1962), cert. denied, 371 U. S. 896, 83 S. Ct. 194, 9 L. Ed. 2d 127 (1962). See United States vs. Provoo, supra; Taylor vs. United States, 99 U. S. App. D. C. 183, 238 F. 2d 259 (1956). That the delay in doing justice in this case occurred between offense and formal complaint rather than between complaint and indictment or indictment and trial, does not immunize it from the constitutional command. The right of a suspect to speedy determination of guilt or innocence is not lost merely because the delay in the process occurs before the formal charge, rather than after. Mann vs. United States, supra.

Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors."

* * * "In some types of criminal prosecution of course, delays before complaint will often be unobjectionable. When involved investigation, difficult prosecutory decisions, or complex preparations for the grand jury are necessary, the delay may be warranted. When the authorities are unsure against whom to proceed, or doubtful of the adequacy of the case, then, of course, no formal charges should be brought. But when there is no such necessity, there should be no delay. In this case, where the testimony of an officer and an informant was in hand and nothing more re-

mained to be done but the signing of a formal charge, the delay of seven and a half months before that step is a circumstance demanding explanation.

"The trial court here quite properly put the burden on the Government to justify the delay. The government must show that "there was no more delay than is reasonable attributable to the ordinary processes of justice." Williams vs. United States, 102 U. S. App. D. C. 51, 53, 250 F. 2d 19, 21 (1957) (opinion of Judge Brazelon). The explanation offered at trial for not making an immediate arrest at the time of the illegal transaction was the desire of the narcotics agent to effect a second transaction a few days later. But when the attempt at such a second sale was unsuccessful, still no charge was made. The Government explains the continued delay by the need not to expose the undercover identity of the agent, who continued at work in the Washington Area attempting to secure evidence against others. But it does not appear that the agent continued this undercover work until the date of the complaint eight months later, for, at some time in this period, he left Washington to do similar work in New York. Moreover, in March he exposed his role here by signing complaints against other addicts. Still no complaint was made against appellant until May. At least this final delay to two months seems longer than "reasonably attributable to the ordinary processes of justice." In the circumstances of this case, however, it may be proper to defer to the determination of the trial court on this question.

"A showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment. Taylor vs. United States, supra; Petition of Provoo, supra, at 203; United States vs. Lustman, 2 Cir., 258 F. 2d 475 (1968), cert. denies, 358 U. S. 880, 79 S. Ct. 118, 3 L. Ed 2d 109 (1958). On the contrary, the

Government bears the burden of proving "that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay." Williams vs. United States supra, 102 U. S. App. D. C. at 53, 250 F. 2d at 21."

* * *

See also, Ross v. United States, 349 F.2d 210, U. S. App. D. C., 1965; Woody v. United States, 370 F.2d 214, U. S. App. D. C., 1966; *United States v. Harbin, 377 F.2d* 78, 4 *Cir.*, 1967; Chapman v. United States, 376 F.2d 705, 2 Cir., 1967; Terlikowski v. United States, 379 F.2d 501, 8 Cir., 1967; United States v. Feinberg, 383 F.2d 60, 2 Cir., 1967.

Clearly, no involved investigation was conducted in the instant case, as is shown by an examination of the evidence introduced at the trial. Every bit of evidence was in the hands of the Government on the first day of its investigation. Counsel cannot imagine that there were any difficult prosecutory decisions to be made, complex preparations necessary for the Grand Jury, or that the Government was unsure against whom to proceed in this case. In addition to questioning why there was such a delay in obtaining an indictment, there remains a question concerning why the Government sought an indictment in the first place. This matter involved a misdemeanor, and, therefore, it would seem most reasonable, certainly expedient, that petitioner be proceeded against by an Information. There is little satisfaction to be had from the Assistant District Attorney's answer to the question of the District Court on this point. He said, "Your Honor, I cannot answer that question." Indeed, the answer would seem to require dismissal of the indictment.

Although, as the Court said in Nickens v. United States, supra, no showing of prejudice is necessary when asserting a constitutional right under the Sixth Amendment, it

should be remembered that petitioner was a duly elected public official, the Assessor of Kanawha County, West Virginia, at the time the prosecution was instigated. Petitioner's uncontradicted testimony clearly shows that the prosecution was brought about at the behest of a local newspaper (A. 40), and the testimony of a witness for the defense clearly shows the effect on the petitioner. He was under a continuous public indictment because of the explosive nature and frequent and repetitious news releases of the various media from September, 1964 until the first legal indictment was returned in March, 1966, some 18 months (Tr. 17, 18—4-2-'68). Consequently, obviously prejudice to petitioner was present throughout the delay, and afterwards.

II. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THERE WAS NO UNREASONABLE POST-INDICTMENT DELAY OR DENIAL OF A SPEEDY TRIAL IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND OTHER COURTS OF APPEALS, AS WELL AS ITS OWN PRIOR DECISIONS.

The petitioner moved the trial court to dismiss both of the indictments returned against him on the ground of unreasonable post-indictment delay, resulting in the deprivation of a speedy trial in violation of the Sixth Amendment of the Constitution of the United States of America. The facts in this case compare closely with the facts in the case of Hanrahan, v. United States, 348 F.2d. 363, decided by the United States Court of Appeals for the District of Columbia Circuit on June 24, 1965. In both cases the original indictments were dismissed after some considerable delay; in each case the defendants moved for a speedy trial prior to the dismissal of the indictment; in both cases the defendants were re-indicted; in both cases the defendants again moved for dismissal on the ground of unreasonable delay, and they were again overruled; and in both cases the defendants were tried, convicted and appealed. Here the com-

parison ends, because the Court of Appeals reversed the District Court in the Hanrahan case. In that case, the defendants were indicted in Puerto Rico in July, 1959. They moved for a Change of Venue and it was granted in May, 1960. They were arraigned in August, 1960, and trial was set for October. The Court granted the government a continuance until November of that year.

However, in October the government moved for a further continuance, stating that it expected to dismiss this Indictment and obtain a new one, and the Court granted the continuance without limitation. Seventy-six (76) weeks later a new Indictment was returned, whereupon the defendants moved to dismiss it for lack of a speedy trial. Their Motion was overruled, the trial started in January, 1963, and the defendants were convicted and subsequently appealed. The Appellate Court held:

"(1), Rule 48 (b), FED. R. CRIM. P., if not the Sixth Amendment, in terms requires the prosecutor to proceed without "unnecessary delay." The prosecutor's responsibilities under these provisions begin, not when the indictment is returned, but when the prosecution is begun. Nickens vs. United States, 116 U. S. App. D. C. 338, 323 F. 2d 808 (1963), cert. denied, 379 U. S. 905, 85 S. Ct. 198, 13 L. Ed. 2d 178 (1964), does not hold otherwise, if indeed it could in the face of the language of Rule 48 (b). Therefore, the critical question in this case is, not when was the indictment filed, but when was the prosecution commenced." * * *

* * * "(3, 4,) In curtailing the length of criminal prosecutions, the law recognizes certain interests of the person accused and attempts to protect those interests. Speedy trial provisions seek, first, to prevent lengthy pre-trial imprisonment where the accused is unable to make bail, or pre-trial restriction of movement when bail is available. Second, and

perhaps equally important, these provisions seek to minimize the anxiety and attendant evils which are invariably visited upon one under public accusation but not tried. Finally, they seek to insure that the ability of the accused person to answer the charge will not be impaired on account of lost witnesses and faded memories due to the passage of time. In this case, these protected interests were threatened by a public accusation of mail fraud which went unresolved for close to four years." * * *

* * * "Two questions, however, arise from this record which went unanswered in the trial court because of the court's failure to consider the time preceeding the second indictment. First, did the prosecutor exercise reasonable diligence in seeking the second indictment? At the time Government counsel announced his intention to dismiss the Puerto Rican indictment in favor of a new indictment, he estimated that the process would take about six weeks. The actual time elapsing from the date of that estimate to the return of the second indictment proved to be seventy-six weeks —roughly twelve times the original estimate. This disparity demands explanation.

"Even if satisfactory explanation is forthcoming, however, a second question remains. It is highly probable that the prosecution of this case would have been shortened by as much as two years if the original indictment had been brought in the District of Columbia, where appellant lived and where the offense centered instead of in Puerto Rico. Moreover, it is arguable that reasonable regard for the interests of the accused might have compelled the Government to anticipate the appellants could not be speedily and fairly tried in a distant place where many of the people spoke no English and where adverse feeling against outsiders charged with defrauding local businessmen were certain to have some effect. Discretion existed in law, it is true,

to bring the original prosecution in either the District of Columbia or Puerto Rico. But why was that discretion exercised by bringing the prosecution in Puerto Rico? If the decision to prosecute in Puerto Rico rather than in the District of Columbia was a deliberate choice made for a supposed advantage, then the delay directly resulting from the choice must be considered in appraising appellants' speedy trial claim.

"The record in this case, voluminous as it is, is not sufficient to enable us to resolve the question raised by appellants' denial of speedy trial claim, nor should we decide them in the first instance on appeal. Therefore the case must be remanded for further proceedings. If the court should find that all the delay attributable to the prosecutor was necessary for fair and just prosecution of the charge of mail fraud, then the convictions will stand. If, on the other hand, the court should find that the prosecution was conducted with such disregard of appellants' interest that it can be said that the delay resulted from deliberate, or at least negligent, actions on the part of the prosecutor and the prosecutor fails to show "that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay," then appellants' Sixth Amendment rights have been denied and the conviction must be vacated and the indictments dismissed. Finally, if no constitutional violation is found, but unnecessary delay under Rule 48 (b) is present, then the decision whether to vacate and dismiss lies within the sound discretion of the trial court. In exercising that discretion the court should consider the prejudice resulting from possible loss of evidence as well as the hardships appellants might have suffered by reason of the delay in the prosecution." * * *

The Fourth Circuit decided the case of Pitts v. State of North Carolina, 395 F. 2d 182, on April 1, 1968. In the

opinion handed down in that case, the Fourth Circuit approved the principles set forth in Hanrahan v. United States, supra, and Nickens v. United States, supra, as well as many others cited in those cases. There the Fourth Circuit clearly points out that the burden is upon the Government to prove that the "accused suffered no serious prejudice beyond that which ensues from ordinary and inevitable delay." In the instant case, the Fourth Circuit completely ignores its decision in Pitts, supra, although specifically called to its attention. The same is true of the case of United States v. Harbin, 377 F. 2d 78, decided by the Fourth Circuit in 1967.

See also United States v. McWilliams, 163 F. 2d 695, U. S. App. D. C., 1947; Fields v. United States, 370 F. 2d 141, 4 Cir., 1966; United States v. Banks, 370 F. 2d 141, 4 Cir., 1966; and United States v. Choate, 276 F. 2d 724, 86 ALR 2d 1337, 1343-1350.

The District Court for the Southern District of West Virginia, in its Memorandum Opinion (A. 11), on Page 6 thereof, seems to indicate that by questioning the makeup of the Grand Jury that returned the original indictment against the petitioner, which the court subsequently dismissed for the reasons previously stated, the petitioner waived or somehow lost his right to press the issue of the government's post-indictment delay. Counsel do not believe that the petitioner is to be deprived of one constitutional right because of asserting another constitutional or statutory right. Again, in the case of Pitts v. North Carolina, supra, the court held: "Every reasonable presumption will be indulged against waiver of fundamental constitutional rights."

Looking at the facts of this case again, why would the petitioner ask for a speedy trial prior to a ruling being giv-

en on his motion to transfer? To begin with he didn't know where the trial would be held! On the other hand, to press for a speedy trial prior to such ruling would be tantamount to asking the Court to overrule his motion to transfer. But finally, and most respectfully, to whom would petitioner have addressed such a motion or request? The regular judge for the Northern District Court of West Virginia had disqualified himself, and no other judge had been designated to sit in the matter. Again, why should the petitioner be required to perform a useless act, and move the Court for a speedy trial? In addition, counsel is unaware of any Rule or ruling requiring such a motion while a prior undecided motion is still pending before the court. If one can not obtain a decision on the first, why would he be required to seek an answer to a second one.

The District Court further indicated in its Memorandum Opinion (A. 11), on Page 7 thereof, that it believed the petitioner occasioned the delay, and said, "but I do not believe they are entitled to any advantage of alleged constitutional delay in the prosecution which necessarily resulted by reason of the motions which were filed." Deferentially, the petitioner did not cause the delay in ruling on his motion to transfer to his home district. The question still remains to be answered as to what brought about the delay from March 25, 1966, to the 28th day of September, 1967, when the other motions and pleadings were filed. We respectfully suggest that neither petitioner nor his counsel could have occasioned this delay.

Further, in this connection, petitioner's counsel made no motion to disqualify the Judge of the United States District Court for the Northern District of West Virginia, at Wheeling, and in fact, by the motion to transfer, asked him to act. Hence, the delay caused by the disqualification of the regular Judge is not to be charged to petitioner, who

was led to believe that a ruling would be forthcoming within the immediate future, as shown by the Transcript (Tr. 6-4/4/'66). Even now, petitioner does not know when nor why the regular Judge disqualified himself. However, in making this statement, counsel imputes no impropriety to the District Judge, other than delay.

III. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA DID NOT ERR IN REFUSING TO GIVE PETITIONER'S REQUESTED INSTRUCTIONS NOS. 10, 11, 12 AND 13, IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND OTHER COURTS OF APPEALS.

Pursuant to the trial court's direction, petitioner submitted several requested instructions. Instruction No. 10, (A. 62) refused, is as follows:

"The Court instructs the jury that the Indictment returned against the defendant Sam L. MacCorkle in this case charges five separate and distinct offenses. First, that he wilfully and knowingly failed to file his income tax return for the calendar year 1959 on or before the 15th day of April, 1960; second, that he wilfully and knowingly failed to file his income tax return for the calendar year 1960 on or before April 15, 1961; third, that he wilfully and knowingly failed to file his income tax return for the calendar year 1961 on or before April 15, 1962; fourth, that he wilfully and knowingly failed to file his income tax return for the calendar year 1962 on or before the 15th day of April, 1963; fifth that he wilfully and knowingly failed to file his income tax return for the calendar year 1963 on or before the 15th day of April, 1964.

"The elements of each of the five offenses charged in the indictment that the Government must prove to your satisfaction beyond all reasonable doubt are as follows:

"First, that the defendant's income was sufficient in each of the said years, that is that it was in excess of $600.00 in each of said years, to require him to file a return. It has been stipulated in this case, and thus it is admitted by the defendant that his income was sufficient in each of said years to require him to file an income tax return. Second that the defendant knew or should have known that he was required to file an income tax return in each of the said years. Again, it has been stipulated and the defendant thereby admits that he knew he was under a duty to file such returns at the time hereinabove referred to. Third, that he failed to file such returns timely. Again it has been stipulated and the defendant admits that he failed to file such returns timely. Fourth, that the defendant's failure to file his returns timely was wilful. This element of the offense is denied by the defendant. Therefore, the sole issue for your determination as to each of the offenses charged in the indictment is whether or not the defendant wilfully failed to file his returns on time.

"In considering whether or not the defendant wilfully failed to file his income tax returns as charged in the Indictment, you should not ignore or overlook the word "wilful" nor its meaning. A wilful failure to perform an act is to omit the doing of such act with an "evil motive" or "bad purpose". Mere laxity, inadvertence, careless disregard of the duty imposed by law, negligence, or even gross negligence on the part of the defendant, unattended by evil motive or bad purpose, is not sufficient to establish the element of wilfulness.

"Therefore unless the Government has proved that the defendant's failure to file his returns was wilful, to the exclusion of every reasonable doubt, you must find the defendant not guilty. United States vs. Palermo 259 F 2d

872; Lumetta vs. U. S. 362 F 2d 644; U. S. vs. Vitiello 363 F 2d 240."

The Court apparently believed that the instruction did not clearly state the law, for at least two reasons. That instruction attempted to tell the jury that there were four elements of the offense to be proved, and that "knowledge" on the part of the defendant, that he was required to file such return, was a separate element. However, the Court charged the jury that there were only three essential elements, obviously believing that "knowledge" was part of the element of "wilfulness". The Court said (A. 74).

"And Thirdly,—that the failure to file such income tax return was wilfully and knowingly done.

"Ladies and Gentlemen of the Jury, all three of these elements as to each Count are necessary to be proved by the Government beyond a reasonable doubt. * * *"

The Court further charged the jury as follows: (A. 75).

"* * * Now, the third element is where the controversy is in this Case—the third essential element which the Government is required to prove beyond a reasonable doubt, in order to establish the offense charged in the indictment is that the Defendant failed to file the income tax returns within the time required by law; that the failure was wilfully and knowingly—now, the word, "wilful" has a number of different meanings, depending on the context in which it is used. As it is used in the Statute which I have read to you and the one that is involved in this Case, "wilful" means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligent. Mere negligence, even gross negligence, for that matter, is not sufficient to constitute wilfulness. It means an act done

with bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately, or perversely, with bad motive and with a specific and wrongful intent. In other words, a failure to act is wilfully done if done voluntarily, purposefully, and with a specific intent to fail to do what the law requires to be done; that is to say, with bad purpose, either to disobey or bad motive to disregard the law. *I charge you that the only bad purpose necessary for the Government to prove in this Case, is the deliberate intention on the part of the Defendant not to file returns, which the Defendant knew he was required to file at the time he was required by law to file them.*" (Emphasis supplied)

Counsel believes this interpretation of the law to be incorrect. Surely one could know of a legal requirement to perform an act and fail to perform it without such failure being wilful. This point is raised because it is believed that the jury was given the impression that the defendant's failure to file his return was wilful, simply because he knew he should do it and failed.

If the Court's charge to the jury concerning the element of wilfulness was correct in other respects, then the last sentence of that portion of the charge destroyed, or "pulled the teeth" from it. The Court said:

"I charge you that the only bad purpose necessary for the government to prove in this Case is the deliberate intention on the part of the Defendant not to file returns, which the Defendant knew he was required to file at the time he was required by law to file them."

It is believed that this portion of the charge overrode anything else that the Court said or could have said in this connection, and that, as such, had more influence on the jury's verdict than any other aspect concerning their finding of wilfulness.

In the case of United States vs. Murdock, 290 U. S. 389, 78 L. Ed. 381, the defendant intentionally and deliberately refused to supply information in violation of Section 256 of the Revenue Act of 1926, and Section 148 of the Revenue Act of 1928. The Court held:

"* * * The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

Secondly, the Court refused to use the word "evil" in its charge concerning the defendant's motive or purpose. Counsel believes that the word "evil" should have been used in the charge, and that such word carries with it a connotation much stronger than the word "bad". Counsel objected to this portion of the Court's charge (Tr-236-7/29/68). United States vs. Murdock, supra; Spies vs. United States, 317 U. S. 492, 87 L. Ed. 418; United States vs. Palermo, 259 F. 2d 872; United States vs. Vitiello, 363 F. 2d 240.

Defendant's Requested Instruction No. 11 was offered for two purposes. First, it defined "evil motive" and "bad purpose". Secondly, it would have submitted the question of absence of "evil motive" to the jury. The instruction is as follows:

"The Court instructs the jury that before you may find that the defendant's conduct in failing to file his tax returns timely was wilful, it is essential that you first determine that his motive was evil, and that he failed to file them for some bad purpose.

"Evil motive is defined as that which leads or tempts the mind to indulge in a criminal act or omission, or as the moving power which impels for a definite result. Bad purpose is the result intended to stem from an evil motive. Evil mo-

tive and bad purpose are facts that may be inferred by you, not merely from the circumstances attendant to the defendant's omissions, but, in conjunction with these, from all previous occurrences having reference to, and connected with, the offenses charged in the Indictment.

"Therefore, you are further instructed that if, after having heard and considered all of the evidence in this case you have a reasonable doubt as to the existence of, or are convinced of the absence of an inducing evil motive and bad purpose for the defendant to commit the offenses charged in the Indictment, you must find the defendant not guilty.

United States vs. Palermo, 259 F 2d 872; Lumetta vs. U. S., 362 F 2d 644; U. S. vs. Vitiello, 363 F 2d 240." (A. 64).

Clearly the Court charged the jury that it was to consider the defendant's purpose or motive. It seems that a definition of motive or purpose would necessarily follow.

Concerning the absence of "evil motive", such an instruction was offered in United States vs. Murdock, supra; the Court ruled that such an instruction was proper.

"* * * The trial court could not, therefore, properly tell the jury the defendant's assertion of the privilege was so unreasonable and ill founded as to exhibit bad faith and establish wilful wrongdoing. This was the effect of the instructions given. We think the Circuit Court of Appeals correctively upheld the respondent's right to have the question of abence of evil motive submitted to the jury, and we are of opinion that the requested instruction was apt for the purpose."

In the present case, the Court said of Wilfulness" * * * it means an act done with bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately, or

perversely, with bad motive and with a specific wrongful intent * * *".

In light of the decision in Spies vs. United States, supra, this instruction appears to have been rejected. That case clearly distinguishes between intentional and wilful failure to perform an act.

In United States vs. Palermo, 259 F. 2d 872 at 880, the Court said:

"In Forster vs. United States, 9 Cir., 1956, 237 F. 2d 617, also a Section 145 (b) case, the trial judge initially properly charged the jury on the score of wilfullness. However, in granting further instructions to the jury, at its request, it charged as follows:

" 'When used in a criminal statute—that is, the word "willful" or "willfully"—when used in a criminal statute it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversely.

" 'The word is also characterized—employed to characterize a thing done without ground for believing it lawful, or conduct marked by reckless disregard whether or not one has the right so to act." (Emphasis supplied.)

'With respect to these additional instructions the appellate court, after observing that they were 'verbatim from United States vs. Murdock' (supra) held that they were erroneous and reversed.

"We have referred to these cases in some detail because they demonstrate that the District Court in the instant case applied an erroneous standard in determining "wilful" failure to pay.

"(2) As earlier pointed out the District Court was guided to its finding of willfulness by the definition of

"willful" as stated in the Murdock case. Because it found that defendant's failure to pay taxes on time "was stubborn, obstinate, and perverse"; he acted "without justifiable excuse"; "his conduct was marked by a careless disregard" and "there was a want of justification", it made the ultimate fact-finding of willfulness.

"The factor stated, neither singly or cumulatively, are self-sufficient to establish "willfulness" under Section 145 (a). Forester vs. United States, supra. Nor does even "gross negligence" do so."

Defendant's Requested Instruction No. 12 was taken from the language in the Palermo Case, supra. (A. 65).

"The Court instructs the jury that although the defendant, Sam L. MacCorkle, admits that he was required to file the income tax returns alleged in the Indictment, that he knew he was required to file them, and that he failed to file them within the time prescribed by the law, and the jury believes that his failure to file his returns timely was caused by his laxity, negligence, gross negligence, inadvertence, or that it was intentional and without legal justification on the part of the defendant, nevertheless, if you have a reasonable doubt as to whether such failure was prompted by an evil motive or bad purpose on the part of the defendant, then you must return a verdict of not guilty in this case."

The effect of such instruction was to tell the jury that regardless of whether the defendant's failure was the result of a negligent or intentional omission, if they did not believe that it was prompted by evil motive or bad purpose they could not convict. Once again, it is in direct opposition to the Court's charge.

Defendant's Requested Instruction No. 13 was also taken from the language of the Palermo case, supra. It in effect

told the jury that although the defendant's conduct established a pattern of behavior, that without additional evidence of some evil motive or bad purpose they could not convict (A. 65).

In United States vs. Vitiello, 363 F. 2d 240, at page 242, the Court said: "Willfulness * * * requires evidence of a specific wrongful intent—an evil motive—at the time the crime charged was committed * * *. Mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by 'evil motive' are not probative of 'willfulness.' ".

IV. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA DID NOT ERR IN PERMITTING THE INTRODUCTION INTO EVIDENCE OF GOVERNMENT'S EXHIBITS NUMBERS 9, 10, 11, 12, 13, AND 14 IS A DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND HAS SANCTIONED A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioner objected to the introduction of Government's Exhibits Nos. 9, 10, 11, 12, 13, and 14, but was overruled (Tr-89, 90 & 91-7/29/69). Exhibit No. 9 was defendant's income tax return for the year 1958, and Exhibits 10, 11, 12, 13, and 14 were his income tax returns for the years 1957, 1955, 1954, 1953, and 1952. (Tr. 93-99-7/29/68). The evidence clearly shows that the returns for the years 1955, 1956 and 1957 were timely filed, although the returns for the years 1954, 1953, and 1952 were filed late. Upon reflection, counsels' objection to the introduction of Government's Exhibit No. 9, the 1958 return, may have been hasty. However, this is not so for the years 1952 through 1957. The latter three were filed timely, while the former were late. The only purpose given for the introduction of

these prior returns was an attempt to show a "pattern of behavior". This is reflected in the Court's charge to the jury (A. 76). Counsel does not believe that these prior returns show a "pattern of behavior". On the contrary, they clearly show that there was no such pattern. Counsel will agree that petitioner's late filing for the years 1959 through 1963, and perhaps 1958, could conceivably justify the Court's charge concerning a "pattern of behavior". Not so with the others! Would a late filing in 1935, again in 1945, and again in 1965, with timely filings in between, justify a "pattern of behavior" charge in 1968? Surely there is some limitation to be placed upon such evidence. Justice demands it! In the instant case, if the years 1958 through 1963 were insufficient to establish such a pattern, then the years 1952, through 1954 could not. And what of the timely filings in 1955, 1956 and 1957? This evidence could only inflame, mislead or prejudice a jury, while having no probative value whatsoever. While the "pattern of behavior" cases are numerous, no authority has been found to justify this evidence.

As a matter of fact, the record shows (Tr. 174-7/29/'68) that affidavits were appended to the 1952, 1953, and 1954 income tax returns stating that the reason for the late filing was "over-sight with no intention to violate the law or evade the payment of tax due", and that they were signed and notarized before one Richard E. Evans, Internal Revenue Agent, who also signed them. What possible connection could these exhibits, or the testimony concerning them, have bearing on the theory of "pattern of behavior"? Petitioner's objection to the introduction of this evidence was overruled by the court (Tr. 88-7/29/'68).

V. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THE DISTRICT COURT DID NOT ERR IN REFUSING TO GIVE PETITIONER'S REQUESTED INSTRUCTIONS NUMBERS 3, 5, 6 and 9 SANCTIONED A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL

PROCEEDINGS, SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION, AND IS NOT SUPPORTED BY APPLICABLE PRINCIPLES OF LAW AND EVIDENCE.

Petitioner's Requested Instruction No. 3 embodied the theory that proof beyond all reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with his innocence, was necessary before the jury could convict. This instruction is normally considered a stock instruction to be given only in circumstantial evidence cases. It was refused by the Court (A. 60).

Petitioner's Requested Instruction No. 5 is believed to have been particularly appropriate in this case. It is as follows:

"5. The Court instructs the jury that every fact necessary to constitute the offense charged must be proven beyond a reasonable doubt and that if there is a reasonable doubt as to any such fact, you shall acquit; that the result of the evidence must be to exclude every reasonable hypothesis of innocence, and be consistent only with the guilt of the accused; that the jury is not at liberty to guess, and where a fact is susceptible of two interpretations, one of which is consistent with innocence of an accused, they cannot arbitrarily adopt the interpretation which incriminates him. 142 Va. 655, 128 S.E. 459." (A. 61).

This instruction went to the very heart of the Government's case. The Government was able to show merely that the petitioner, knowing he was required to file the returns, failed to file them timely. The only evidence offered in support of the willful element of the crime pertained to "pattern of behavior." In opposition, the petitioner testified that his failure was through negligence and inadvertence, not intentional. Therefore, if this instruction had been given, the jury could not possibly have adopted the interpretation of the evidence necessary to convict.

Petitioner's Requested Instruction No. 6 is thought to be a companion instruction to No. 5. It would have told the jury that "if you believe there is any conflict as to the material evidence in this case, a part of which tends to establish the innocence of the accused, and a part of which tends to establish his guilt, and the jury has a reasonable doubt as to which is true, the jury is instructed that it is your duty in that event, in arriving at your verdict, to adopt the evidence, theory and conclusion which is most favorable to the defendant, since the defendant is entitled to the benefit of every reasonable doubt as to his guilt or innocence of the crime charged against him. 89 W. Va. 301, 109 S.E. 326." (A. 62).

Petitioner's Requested Instruction No. 9 simply told the jury that "if there was any one essential fact proved to the satisfaction of the jury which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt, and the jury should find the defendant not guilty. 47 W. Va. 267, 34 S.E. 734." (A. 62).

It is not believed that the Court's charge to the jury embodied these basic theories of the law concerning the rights of the accused, and that if they had been given the result would have been different.

VI. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THE DISTRICT COURT DID NOT ERR IN ITS RULINGS ON ALL OTHER ERRORS ASSIGNED IS NOT SUPPORTED BY APPLICABLE PRINCIPLES OF LAW AND EVIDENCE.

Although petitioner believes that the other errors assigned to the Court of Appeals are sound, petitioner does not believe it is necessary to elaborate on them at this time; however, if the Court is so desirous, petitioner will comply forthwith.

CONCLUSION

For the reasons assigned, petitioner prays that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the Opinion and Judgment of the Fourth Circuit, entered in Case No. 12,797, on February 28, 1969, as aforesaid.

Respectfully submitted,

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800 Terminal Building
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Counsel for Petitioner

APPENDICES

JUDGMENT

United States Court of Appeals for the Fourth Circuit

No. 12,797.

UNITED STATES OF AMERICA,

Appellee,

vs.

SAM L. MACCORKLE,

Appellant.

Appeal from *the United States District Court for the Southern District of West Virginia.*

This cause *came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.*

SAMUEL W. PHILLIPS,
Clerk

A True Copy, Teste:

SAMUEL W. PHILLIPS, *Clerk*

By MARGARET M. WALTON,
Deputy Clerk

OPINION OF FOURTH CIRCUIT

United States Court of Appeals for the Fourth Circuit

No. 12,797.

UNITED STATES OF AMERICA,

Appellee,

vs.

SAM L. MACCORKLE,

Appellant.

Appeal from *the United States District Court for the Southern District of West Virginia, at Charleston.* EUGENE A. GORDON, *District Judge.*

(Argued February 4, 1969 Decided February 28, 1969).

Before SOBELOFF, WINTER and BUTZNER, Circuit Judges.

JOHN A. AMICK and CHARLES M. LOVE (JOHN C. FISHER on brief) for Appellant, and W. WARREN UPTON, Assistant United States Attorney; (MILTON J. FERGUSON, United States Attorney, on brief) for Appellee.

PER CURIAM:

Appellant Sam MacCorkle was convicted of willful failure to file income tax returns for the years 1959 to 1963 in violation of 18 U.S.C. § 7203. On appeal, he presses principally two of his multiple claims of error.

He contends that the District Court erred in failing to dismiss the indictment because of undue delay both in bringing the original indictment and in bringing the defendant to trial once the indictment had been returned. We do not find that the asserted delay constituted an unreasonable prolongation of either the original investigation or the normal processes of indictment and trial. Consequently, we conclude that the District Court did not err in refusing to dismiss the indictment.

The appellant also contends that the court committed error in its instruction to the jury on the meaning of "wilfullness," which is an element of this statutory offense. We find, however, that the court's instruction on the issue was not only correct, but that it was substantially the same as the request for instruction tendered by the defendant.

We have considered the remainder of the appellant's claims of error and find them without substance. The conviction is therefore

Affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

vs. CR. 68 — 4 CHARLESTON

SAM L. MACCORKLE

ORDER

On this 3rd day of September, 1968, came the attorney for the Government and the defendant, Sam L. MacCorkle, in person and by John A. Amick and Charles M. Love, Jr., his counsel.

And this case came on for a hearing on the defendant's motions to set aside the verdict returned by the jury on the 31st day of July, 1968, and to award him a new trial, and to Arrest the said Judgment returned as aforesaid. And the Court having considered said motions, and after having heard arguments of counsel, is of the opinion that said motion should be, and they are hereby, denied.

And the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) months on Count 1 of the Indictment, the defendant to report to the office of the United States Marshal on Tues-

day, September 17, 1968, at 10:00 o'clock A.M. to commence serving said sentence.

IT IS FURTHER ORDERED that the imposition of sentence on Count 2 of the indictment is suspended and the said defendant placed on probation for a period of four (4) years, said period of probation to run consecutively with the sentence imposed on Count 1;

that the imposition of sentence on Count 3 of the indictment is suspended and the said defendant is placed upon probation for a period of four (4) years, said period of probation to run concurrently with the probationary period on Count 2;

that the imposition of sentence on Count 4 of the indictment is suspended and the said defendant is placed upon probation for a period of four (4) years, said probationary period to run concurrently with the period of probation on Count 2; and

that the imposition of sentence on Count 5 of said indictment is suspended and the defendant is placed upon probation for a period of four (4) years, said probationary period to run concurrently with the period of probation on Count 2, making a total period of probation of four (4) years.

It is ORDERED that said probation shall be upon the terms and conditions prescribed by law and any other general and special conditions ordered by the Court, and in accordance with the General Provisions of Probation Form No. 7, and upon the special condition that the defendant, Sam L. MacCorkle, keep accurate records of all income and disbursements and timely and correctly file all tax returns required by the Internal Revenue Code.

The Court further advised the defendant of his right to an appeal; that the notice of appeal must be filed within ten

days from this date, and that if he were unable to pay the costs of an appeal he could apply for permission to proceed in forma pauperis.

It is ORDERED that no costs be recovered of the said defendant and the said Sam L. MacCorkle is continued on his own recognizance for his appearance as aforesaid.

ENTER: September 3, 1968

Eugene A. Gordon
U. S. DISTRICT JUDGE
Under designation

MEMORANDUM OPINION OF DISTRICT COURT

On January 18, 1968, a grand jury in the United States District Court for the Northern District of West Virginia at Wheeling returned a five count indictment against the defendant, charging him with violations of 18 U.S.C. § 7203 by wilfully and knowingly failing to make federal income tax returns for the years 1959 through 1963. Upon motion of the defendant an order was entered on January 31, 1968, transferring this case to the United States District Court for the Southern District of West Virginia at Charleston, this being the district in which the defendant resides. Thereafter the defendant filed several motions, which motions were heard and evidence taken thereon in this Court on April 2, 1968. It was stipulated by counsel for the Government and the defendant that the proceedings and record in the case of United States vs. Sam L. MacCorkle, Criminal No. 1975, should be incorporated and considered in any appropriate manner in the disposition of the motions in the present case. The motions will be dealt with in this opinion based on the record of Criminal Case No. 1975 and the pleadings and briefs filed in the present case together with the evidence and exhibits presented at the haring on April 2, 1968.

I

Motion to Dismiss

The defendant has moved that the indictment returned against him be dismissed and assigns several grounds in support thereof. First of all, he challenges the composition of the grand jury which returned the indictment on the theory that prospective jurors were selected by the key man system and that the method of selection resulted in a systematic exclusion of certain groups, residents and citizens. As might be expected, the defendant places primary reliance upon the Fifth Circuit case of Rabinowitz vs. United States 366 F. 2d 34, in support of this particular challenge to the indictment. However, I do not feel that Rabinowitz is at all controlling in the present case inasmuch as the evidence presented on this motion clearly shows that there was no systematic or invidious discrimination practiced in the selection of prospective jurors in the Northern District of West Virginia, and that the key man system as operated under Judge Maxwell in the Northern District did secure a fair cross section of the citizenry in the Wheeling Division without regard to social, ethnic or economic considerations. This, of course, is a far cry from the factual background confronting the Court in Rabinowitz which clearly demonstrated that the key man system as operated in Georgia at that time resulted in the systematic exclusion of a fair representation of the Negro race on both their petit and grand juries.

In Criminal Case No. 1975, I sustained the defendant's motion for dismissal of a similar indictment which had been returned by a grand jury in the Northern District of West Virginia at Elkins. Counsel will recall that my action on that motion in that case was based on the fact that the Government was unable to produce evidence that at the time

the Elkins grand jury was drawn the jury box at Elkins contained the names of not less than 300 qualified persons as required by 28 U.S.C. §§ 1861 and 1864. On the contrary the evidence on the present motion shows that the jury box in the Wheeling Division did contain more than the minimum statutory number of names of qualified prospective jurors at the time the grand jury was drawn which returned the present indictment. Without going into detail, this finding is based upon the evidence of Thomas F. Stafford, Clerk of the Court for the Northern District, together with copies of the various orders which were entered by Judge Maxwell relative to both the jury box and the drawing of the grand jury which were placed in evidence at the hearing.

It is my conclusion, therefore, that the jury selection system in the Wheeling Division was not illegal in design, and the manner in which it was operated comported with the Constitution and laws of the United States and, accordingly, at the time of the drawing of the grand jury which returned the indictment in this case, the jury box contained the names of not less than 300 persons who possessed the qualifications for federal jury service as required by 29 U. S.C. § 1864.

II

The defendant also challenges the grand jury on the basis that the grand jurors were required to take an oath concluding with the words "So help me God". There is nothing in the record to show that any grand juror objected to such an oath or that a belief in the Diety was a prerequisite for grand jury service. In any event, the defendant has failed to show any prejudice in regard to this particular challenge and it is my conclusion that it is without merit. See United States vs. Oliver, 363 F. 2d 15 (7th Cir. 1966).

III

The defendant contends that the Government unduly and unreasonably delayed the presentment of the subject charges against the defendant to a grand jury, and that such prosecutorial delay violated the defendant's constitutional rights. The record clearly shows that investigation of the present charges was initiated on September 25, 1964, when the defendant was interviewed by an officer of the Internal Revenue Service and that an indictment was thereafter returned in the Northern District of West Virginia on March 25, 1966. Such a delay is not unreasonable on its face and the nature of the charges are such that it is difficult to perceive any constitutional infirmity which might result by reason of the relatively short period of time which intervened between the initial investigation and the presentment to the grand jury.

IV

The defendant also charges the Government with unreasonable prosecutorial delay from the date of the return of the original indictment in Elkins on March 25, 1966, up until the disposition thereof on defendant's motion in this Court on January 5, 1968. In passing upon this particular ground, it is necessary to refer to the record in Criminal Case No. 1975. As stated the indictment was originally returned in that case in March of 1966 and shortly thereafter the case was transferred to Wheeling for further proceedings therein. On April 4, 1966, the date of the transfer to the Wheeling Division, the defendant by his counsel filed a motion to transfer the case to the Southern District of West Virginia under the provision of 18 U.S.C. § 3237. The Court in the Northern District took no action on this motion until October 12, 1967, when The Honorable Eugene A. Gordon, United States District Judge sitting by

designation entered the order of transfer to the Southern District.

It should be noted that at the time the original motion to transfer was filed the defendant did not have an absolute right of transfer to the district of his residence under Section 3237, and it was not until November 2, 1966, the effective date of the amendment of Section 3237, that a transfer of an offense under Section 7203 became a matter of statutory right. There is nothing in the record in Criminal Case No. 1975 to indicate that the defendant or his counsel pressed for action on the motion to transfer nor did anything to seek a trial on the merits until the matter was presented to Judge Gordon in October of 1967. It should also be noted that on September 28, 1967, shortly prior to the transfer of that case to the Southern District the defendant filed a number of motions including the challenge of the composition of the Elkins grand jury. Counsel will recall at the hearing on that motion this Court inquired whether counsel desired to press the question of the Elkins grand jury and cautioned them that if the indictment were dismissed on that ground alone the defendant might very well be reindicted for the same alleged offenses. Counsel indicated that they did desire to press the challenge to the grand jury and thereafter on January 5, 1968, this Court dismissed the indictment on that ground alone without prejudice to any further indictment or prosecution in accordance with the law. I might observe in passing that the question of the Elkins grand jury could well have been raised while the case was still pending in the Northern District and could have been disposed of much more expeditiously in that district than it could have been in the transferee Southern District.

A distillation of the facts as disclosed by the record in Criminal Case No. 1975, as well as in the present case, in-

dicates quite clearly to me that neither the defendant nor his counsel pressed for an early trial or disposition on the merits of the charges but rather sought a procedural dismissal under the various motions filed in both of these proceedings. In reaching this conclusion, I do not want to infer that either the defendant or his counsel should in any way be criticized in the exercise of their rights to file these motions, but I do not believe they are entitled to any advantage of alleged constitutional delay in the prosecution which necessarily resulted by reason of the motions which were filed.

V

Defendant seeks a dismissal of counts 1 and 2 of the indictment on the ground that they are barred by the statute of limitations. There is no merit in this contention, however, since the statutory bar had not run at the time of the original indictment on these counts in Criminal Case No. 1975, and they were properly included in the new indictment under the provisions of 18 U.S.C. § 3288.

VI

The challenge to count 2 of the indictment on the ground that April 15, 1961, fell on a Saturday, and accordingly the defendant was not required to file a return until on or before April 17, 1961, is patently frivolous since the Government charges that the defendant filed no return at all for the calendar year 1960 and accordingly is not entitled to the technical advantage sought in his motion.

VII

The defendant challenges count 3 of the indictment on the same basis as that set forth in paragraph VI, and the same ruling is applicable thereto.

VIII

The defendant contends that the allegations of the indictment are so vague, indefinite and uncertain that he is not advised of the nature of the accusations against him and that a conviction of acquittal thereunder would not protect him from further prosecution. The several counts of the indictment are drawn in the language of the statute and clearly specified the offenses and the dates thereof. This is all that is required of the Government and the indictment is held to be sufficient for that reason.

IX

In this last ground in support of a dismissal motion, defendant alleges that the "Clerk of the Court, and the District Attorney have publicly and repeatedly made false statements concerning the offense with which the defendant is charged, and have caused the same to appear in newspapers and other news media of general circulation of this district and state; * * *." The evidence in support of this ground was meager and unsatisfactory and, in any event, the Court finds as a matter of fact that the charges in the defendant's motion are not supported by the facts or the evidence.

In the light of the foregoing observations defendant's motion to dismiss will be denied in its entirety.

Motion for Bill of Particulars

Counsel for defendant have moved that the Court require the Government to furnish a bill of particulars, stating that the offenses charged in the indictment are phrased in the statutory language and that he is unable to adequately prepare a defense to such charges unless he has the benefit of specific times, places, acts, words, and deeds alleged to have

been performed by him or which he failed to perform with reference to the offenses charged in the indictment.

The purpose of a bill of particulars is to enable a defendant to prepare his defense, to avoid surprise at the trial and enable the defendant to plead his acquittal or conviction in bar of another prosecution for the same offense. The offenses charged in the five counts of the indictment are clear and specific and in my opinion need no further particularization. The issue presented in regard to each count is whether or not the defendant failed to make an income tax return for the year in question, and if he failed to make such a return was it done wilfully and knowingly. Additionally, an acquittal or conviction on any one or more counts in the indictment would certainly carry with it the specificity requisite to bar another prosecution for the same offense. Under the circumstances, there is no need for the Government to furnish a bill of particulars and the motion will be denied.

Motion for Production and Inspection

By this motion the defendant seeks an order requiring the Government to produce and permit inspection of items and copies thereof within the possession, custody and control of the Government.

First of all, the defendant asks for the production of any relevant written, or unwritten statements or confessions made by the defendant. In its response to the motion, the Government states that no further statement or confession was obtained from the defendant but that the file does contain a memorandum of an interview with the defendant. It is the opinion of the Court that the defendant is entitled to inspect and copy the memorandum of this interview and this portion of the motion will be granted.

The other aspect of this motion asks for production of all documents, papers, tangible objects or other things collected and obtained by the Government from the defendant, his agents or employees, and includes banks, bank records and statements made by bank officials. This is patently an attempted fishing expedition by the defendant and in the light of the charges contained in the indictment there is no good reason in logic or justice why the Government should be required to comply with such a request. The material sought is not the proper subject of discovery under Rule 16 of the Rules of Criminal Procedure, and in view of the fact that the defendant has filed delinquent returns for years in question, it would serve no useful purpose to cast such a burden on the Government. Accordingly, this portion of the motion will be denied.

Counsel for the Government and the defendant are instructed to prepare an appropriate order reflecting my action on each of these motions incorporating this memorandum opinion by reference therein.

John A. Field, Jr.

United States District Judge

Dated April 25, 1968

STATUTES

Title 26, *Section* 7203, *USC*. Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties pro-

vided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than one year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

Title 18, *Section* 3237 (*b*), *USC*. Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206 (1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and the prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

As amended Aug. 6, 1958, Pub. L. 85-595, 72 Stat. 512; Nov. 2, 1966, Pub. L. 89-713, Sec. 2, 80 Stat. 1108.

RULE 48 (*b*), *Federal Rules of Criminal Procedure. By Court.*

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing the defendant to trial, the court may dismiss the indictment, information or complaint.

PETITIONER'S TESTIMONY

Q (By Mr. Amick) Your name is Sam L. MacCorkle, and you are the Defendant in this Case? Is that correct?

A Yes, sir.

Q Where do you live, Sam?

A 1120 Edgewood Drive in Charleston.

Q How long have you lived in Kanawha County?

Q And where did you live prior to your present address? How long have you lived at this address?

A I lived on Edgewood Drive since November—no, October, 1966, I guess—yes, I've been there almost two years.

Q What is your occupation?

A I'm an attorney.

Q Are you practicing at the present time?

A No.

Q How long has it been since you practiced law?

A Well, actually it has been—I haven't practiced law since 1959,—really since January 1st, 1959, with the exception of a period in the first part—the middle part of 1966.

Q That was in '59 when you were appointed as the Assessor of Kanawha County? Is that correct?

A That's correct.

Q After that, you ran and were elected to another term for four years?

A I was appointed January 1st, 1959 as Assessor to fill the term that—there was a vacancy there when John Slack went to Congress.

Q That's the Congressman for this District at the present time?

A Yes, and then I was nominated and elected in 1960 and in 1964, was nominated but defeated in the General Election.

Q And that defeat came about after public knowledge was had of the failure to file your income tax returns timely?

A Yes, that was after this came up in September, and the election was in November and I was defeated in November, 1964.

Q All right, sir, now, since the time you left the Assessor's Office in Kanawha County, have you held any particular occupation?

A No, by reason—

THE COURT: Excuse me, I didn't get that question.

MR. AMICK: I was trying to determine what his occupation was since he left the Assessor's Office in 1964, Your Honor.

THE COURT: I just didn't understand the question. All right, you may go ahead.

THE WITNESS: I worked for a time. I returned to my law office for a time in 1966.

Q (By Mr. Amick) How long did you stay there?

A Not very long. I forget—two or three months, I think. There was some question, see, in September. Well, let's see; after I left the Assessor's Office, that was January 1st, 1965-1966, when this matter was pending about my taxes, and so I waited for awhile to see whether that was going to be disposed of. There

wasn't any that I could do anything because I didn't know it was going to happen. Then, I waited a year. I was, you know, offered some things, but I couldn't, under the circumstances, take advantage of certain things, to embarrass my friends or something, because I was under this cloud. So—but I still didn't want to go into something that started out and would have this matter come up and put me out of line, so I waited until January the 1st. Well, when nothing had been done by January 1st, 1966, then, I went back to my law office with the law firm and started working, and then, I think, in March of that year, the indictment was returned, and then with the attending publicity and everything, I felt like I was embarrassing them, and it was just the wrong thing to do.

Q In other words, you haven't been able to pursue any occupation since that indictment came about?

MR. UPTON: I object to that.

THE COURT: Don't lead him, Mr. Amick. Sustained. All right, pose another question.

Q (By Mr. Amick) Have you been able to pursue any gainful occupation since March, 1966?

MR. UPTON: Objection.

THE COURT: Overruled.

Q (By Mr. Amick) Now go ahead and answer.

A That wouldn't be true. There are things that I could have done. I haven't done anything gainful—that was particularly gainful, except odds and ends, but I would have to say, no. There are some things I could have done, but because I kept on thinking that this matter would be disposed of, I was waiting to see

what the disposition of this matter would be before I could make my mind up what to do. In other words, I didn't know whether I was going to return to practice law—well, I was just in a quandary.

Q Now, Mr. MacCorkle, in the years, 1959 through 1963, your income was in excess of $600.00 in each year? Isn't that correct?

A That's right.

Q In this, you are required under law to file an income tax return in each of those years? Is that correct?

A Yes, sir.

Q You knew that was the law?

A Yes, sir.

Q Did you file those returns on time?

A No.

Q Now, Mr. MacCorkle, did you intentionally and wilfully fail to file your income tax returns on time in each of those years?

A Well, I didn't purposely fail to file at any time, as an individual item. That wasn't my purpose —just to fail to file income tax, no,—no.

Q Will you tell the Court and the Jury exactly how it happened that you did not file your income tax return in the year, 1959, or the year prior to that, 1958, on time?

A There's background to it. This can't be answered—

Q Go ahead and explain the background to it.

A When I went to the Assessor's Office, and I was appointed January 1st, 1959, the political situation, insofar as I was concerned, since I was in a County Office, I wasn't too much concerned about it, but there was—the assessment situation was rather serious. We had at that time the obligation created by law to increase the assessment for purposes of school aid and other matters. The assessment in Kanawha County had to be substantially increased. This was, of course, to be done as fair and equally as you could possibly do it, you know. You had to bring this percentage up, so I was more concerned about this particular problem. I had had some experience with the Assessor's Office prior to the time that I took up this office, so I was not—really at that time, I was much more interested in this particular matter getting care than I was politics.

Q Did it require a considerable amount of your time and attention?

A It did, because of the fact that I was new, although I had some familiarity with the people in the office. Still, any time that you take on a new job that's different from what you think it will be and you have a lot to learn—in other words, well—

Q Did you have any assistants down there in that office with you?

A I had excellent assistants.

Q How many did you have, sir?

A How many employees?

Q Yes.

A I had in the neighborhood of sixty, when I went in there, but I had sufficient help. They were good people, but we were taking a different direction. Then, in addition to this work, a matter came up, after I had been in there a short time. We have a City election year—we had one in '59, and John T. Copenhaver was the Mayor. Now, Mayor Copenhaver was a Republican. That was his business.

Q You are a Democrat? Is that correct?

A I—I was a Democrat and was put into office as a Democrat. Now, John Copenhaver was quite a popular guy. He had been, in some people's opinion, and I say, they are entitled to this opinion, he made a good Mayor. He was a very—he was a vote getter. He was an excellent politician, and the Democrats—the people that actually ran the Party, here in the County, for some reason—well, they got scared; and I was called into a meeting, and I never thought anything about it, you know—about the purpose of the meeting, and I found out at this meeting, attended by the office holders—the Democratic office holders and so forth—that what they wanted to propose,—that the Democrats not make any substantial effort to present a ticket, even much less a Mayor, to represent the Democratic sides of the proposition because they said, "There is no way to beat John Copenhaver," and so consequently, "Just don't bother about it."

Q Did this suit you?

A No—I state it didn't, because I said, "No, I will not make any kind of arrangement like that. Whether the Democrats can win or not, that's not the point. This is a two-Party proposition, and we're going to try to get whoever runs it—we're going to

try to get somebody to run it, and if we're going to take a beating, well, that's fine, but we're going to have to do it. We're not going to make any arrangement with the Republicans that we lay down on this thing." And so,—

Q Now, when was this?

A This was 1959, in February.

Q And when was that Primary Election that year?

A That was in April.

Q When was the City General Election?

A May. I don't remember the exact date—April —this was in April when the Primary Election—

Q Do you remember what date that was?

A No. It's the second Monday. I don't remember what the date was.

Q Just about the same time, your income tax return was due for 1958?

A It was at that time, yes.

Q Go right ahead. What happened?

A Well, I didn't know—I don't know now. I'm talking like I could do these things and in all this, I realize now, I just knew I was going to fight. That's all I knew, but I didn't know—I didn't realize that I was not going to have much company, because when I went out, it ended up that I had to get a ticket. I had to ask people to run. They would go back, and this was not my idea. I mean, it wasn't what I'd want. When I would go back and ask them, I'd say, you'd

ask the gentleman to run for Mayor. There was no problem because the Mayor—we had somebody who just volunteered that ran for Mayor, which was all right.

Q Who was that?

A That was Kemp McLaughlin.

Q All right.

A He decided he was going to run, and so—but we had to put a ticket together, so you'd go ask people, and they'd go ask the other Democrats—the other Democratic leaders, and they'd say, well, they wouldn't bother with it, so we just had an awful problem trying to get people to run that would be representative of the Party. Then, by reason of the fact that I was doing this, and it was irritating these other people, I ended up with the whole thing on my back, which I had not intended; and I don't want to sound here—I don't want myself to sound that I was doing this. It was just one of those situations where the general—generally, the Democratic Party didn't know; they didn't know about this, and certainly, they weren't being informed by the newspapers, because the newspapers were irritated with my attitude about the matter. Now, that meant that once I had taken on this responsibility—in other words, once I had—and I had about three or four people to help me and this sounds strange, but this is the truth—of a town this size, and trying to put this thing together,—

Q Let me ask you this. During this period, I didn't hear about the Primary Election in April, 1959—was there any mention made to you by anyone concerning your income tax return for the year, '58?

A Yes. When I hadn't filed my return before, in 19—— —I did file them in 1956, I believe it was, and I got them all filed. We had in the office an agent who spent quite a lot of time in the office going over all my records and checking my returns, and while there was no publicity about it; he didn't say anything about filing it or publishing it or anything. These girls in the office,—their names, Loretta Zurkle and Willie Canterbury, now Willie Wills—they knew that my habits, and they knew that I was not the precise person. In other words, I am not a person that did these things—you know, my personal stuff—I didn't do it properly and everything. They watched me pretty carefully and during this time—now I'd left the law offices. These were people at the law offices I had left there, but my 1958 income consisted primarily of my law office work, and they had the records and everything, and Willie called me during this time and said, "Now, I have your income tax prepared, and you get over here and sign it, but before you do, I can't find a copy of your 1957 return, filed in 1958. I don't have a copy of that," and apparently, for some reason, she had to have a copy of it. And I said, "Willie, I'll do this; I'll do this." Well. I didn't do it, and she called back again. It wasn't a question of not doing it—of not doing that—of deliberately not doing it. It was a question of I was doing something else, and I never got around to it, to go on and take care of that particular matter. Now, when I left, after—I of course intended, like you do, I fully intended to do it, and I never had any intention not to do it; I intended fully at some time; I intended that, but there a few times when you go to bed, you say, "Now, I'm going to take care of that the first thing,"

and then, the first thing, you will be doing something else, but that's the main thing about the thing, was the fact that I left that—I let that slip by that particular time, and then, from then on, I did it because I was doing something else, and then, from then on, there was something else. I intended to do it and get ready to do it, and then something would happen.

Q I'll ask you the question that I don't think is of too much importance, but did you continue any of your political activities after the May Primary Election of 1959?

A Well, see, that put me in a peculiar position. I represented from then on—although I didn't control. There wasn't any control. Well, these were people I had dealt with. These were not the kind of people you control, but from then on, when these—when the people in the Party that dealt with Republicans, politically speaking, would be with Republicans—were doing something, then, the other people that dealt just strictly with Democrats would look to me. You see, well, what are you going to do? You're going to have to go. In other words, you're in a position where you've held yourself out as a Democrat, and when they call on you, and they know you held yourself out as a guy that will scrap, then I had to scrap from then on. And then, from then on, from 1959, it's been a fight, and they called it a factional fight. I have been representing one of the—

Q You have been characterized as the leader of the MacCorkle Faction?

A That's been the characterization of my—mostly to detract from this group that I worked with and believed in things that I believe in.

Q As a matter of fact, you've also been characterized in that regard as opposed to the Machine Party—the State House Faction, or the Carson Faction? Is that correct?

A There are some people—John says I am opposed to everything. It just depends on those things. That's just politics. I've just been associated with one group, and they look at things a different way.

Q Now, let me ask you now. During this time, in '57, '58, '59 and '60 and so forth, did you have any interest in any business of any sort?

A John, I have never been in any kind of business with the exception of a sawmill, one time, which I—which was awful. I was never in any kind of a dealings that I didn't come up on the short end of it in business.

Q You didn't have any particular investments other than this oil or gas well that was mentioned here yesterday? Is that correct?

A I had money. I've had some money by inheritance, that I've inherited. No, I have never made any —I've never made anything.

Q That inheritance,—that was the stock and the capital gains, that was mentioned yesterday, that you inherited from your mother—that was mentioned yesterday?

A That's correct, yes.

Q Now, again, did you have plenty of time, after this April Primary in 1959, to go ahead and prepare these returns? What did you do after that?

A Well, I went into this assessing thing pretty strong, and what I did, actually—well, I intended to do it, but didn't do it.

Q Well, what happened to the general election in 1959?

A That was in May,—

Q That followed?

A After that, we had that. Then—

Q Were you involved in that?

A Oh, yes, I was involved in the whole thing.

Q I think we had a general Primary Election instead of General, in the year, 1960—in May of that year, did we not?

A That's right.

Q Were you involved in that?

A I've been involved in that.

Q In what capacity were you involved in that?

A I was a candidate for one thing and then for another thing. I was helping out the people—helping the Democrats.

Q After that May Primary of 1960, was there a General Election that followed that one?

A Yes, I was in that.

Q That was in November, 1960? There wasn't any election in '61, was there—county-wide election, and so forth?

A In '61, that's when they doubled the assessment, and that's when we—

Q They doubled the assessments?

A Not doubled the assessments, but put the two assessment years together.

Q Would you explain that? I don't understand that.

A Well, then the Legislature decided that the assessment year would begin in July rather than heretofore on January 1st, so they put in two assessments. In other words, they had two assessments going at the same time.

Q Now, did that necessitate much book work in the Assessor's Office?

A Well, John, a fair statement would be this: there was never any time after 1959, that I didn't have something going that was important to me—maybe not—and that's day by day—maybe not, as other people look at it, but it was important to me,—that I was a busy person during these times, and I didn't take any vacations, and I worked hard over perhaps some things that other people wouldn't consider important, and some of them would think I was wasting my time, but the matter here, insofar as keeping me,—if I had followed out my intentions, I would have done this.

Q You're talking about filing returns?

A Filing the returns. It was just a matter of choice. There was no purpose—I had no purpose not to do it, and no reason really, not to do it.

Q Were you trying to hide anything from the Government?

A No, I had nothing to hide, really. The things that I did were public.

Q As a matter of fact—let me ask you this; from January 1st, 1959 on, aside from this $10.00 a year payment you got on your gas wells, did you have any private income whatsoever? From January 1st, '59 through 1963 or was it all a matter of public record?

A Well, no, I had some income during the first part of that, during the first two or three years, from dividends on some stock.

Q That's the stock that we discussed a minute ago?

A It was sold during that time.

Q Yes. But your regular income—I mean, your employment income, all of it was from the Assessor's Office, wasn't it?

A That's right.

Q With the exception of these two items? You sold the stock that was inherited?

A That's right.

Q This inheritance stock, was it covered in inheritance returns some years before?

A Yes.

Q So there's nothing hidden about that?

A No.

Q Aside from this interest in the gas well, your entire income came from your salary as Assessor and your percentage from the collection of Capitation Tax

and the sale of Dog Licenses in Kanawha County? Is that right?

A That's right.

Q And that is all a matter of public record that anyone could obtain at any time?

A That's right, yes.

Q Sam, is there any way at all that you could have profited by not filing your returns on time? Any possible way that you could have made a profit by not filing your returns?

A No, I can't figure a way.

Q But you didn't have a way of making any profit by that, did you?

A No, because I couldn't use any money—I didn't have any way. I don't know of any. I wasn't in business.

Q Now, let's go back to those years before this and the years 1952 through '56.

THE COURT: Mr. Amick, I assume that your examination will go on for some while yet?

MR. AMICK: It will go one for a little while, Your Honor, yes.

THE COURT: We have settled the schedule, and I'm not—if you are going on for some substantial time—

MR. AMICK: I only have a few questions, Your Honor, but I think it would perhaps be better if we went to lunch now, and I'll try to conclude this as soon as I can, after we return.

THE COURT: Mr. MacCorkle, you may come down, please, sir.

(171) Q (By Mr. Amick) Sam, I think, prior to our recess, we had discussed physically your activities with regard to the Assessor's Office, in the early part of the year, 1959 and '60 and '61, and your activities in connection with the Charleston City Primary Election in April, 1959 and May of 1959, and I believe, did we not discuss the fact that there was a Primary and General Election on April—in November, 1960? Is that correct?

A That's right.

Q Now, there were also County and Statewide Primary and General Elections in the year of 1962, with the Primary being in May and the General being in November. Did you have any part or participation in that election?

A Yes, considerable.

Q And this was quite a time-consuming thing, also? Is that correct?

A It was, in addition, because all of this had to be done in addition to the work at the Assessor's Office, which required a lot of time; because as I stated before, at that time, we were trying to bring the assessments in line the way we were required to do by law—
(172) to bring it up to a certain level or else we would forfeit school aid and certain things of that nature, and it was a time-consuming—between the two jobs, you had quite a task.

Q In addition to that, there was also the Charleston City Primary Election in April of 1963 and a

General in May, 1963. Did you have some participation in that election?

A The 1963 City Election was a little better. I didn't have to carry quite the load because by that time, we had more Democrats interested in electing a Democrat than we had in 1959.

Q In other words, during all these years, you spent a considerable portion of your time involved in the electoral processes of this County, City and State? Is that correct?

A Yes, that is correct.

Q All right, now, Mr. MacCorkle, the Government introduced exhibits pertaining to the years prior to 1959 through 1963 and some returns that were not filed timely and some that were. Do you recall that?

A Yes.

Q Now, in 1952, '53, '54, '55—will you tell us what the circumstances were surrounding the filing of your returns or non-filing those returns in those years of late filing?

A Well, I have to go back. In 1949, and the dates escape me now, but anyhow, for quite a time before 1950, I spent—I quit the general practice of law and spent all my time on one Case. It required about a year and a half, I suppose, I would say; and that Case was based on paying for it. It was a contingency. It was a Case that was well-known here at the time. It was the Stubner Case—S-t-u-b-n-e-r versus United Carbon, the Stubner Case, and the nature of the Case was such that you couldn't do anything except spend your time on that particular item. Now, when I fin-

ished working on that Case, which we lost—and during all this time, I had no income and during the year immediately after, I was not employed; I was doing some other work, but it was not work—I was not gainfully employed. Then, during this time, after this Stubner Case and during the time right afterward, I didn't—I wasn't—I didn't do things exactly as I should have done. Well, I drank too much, and things were just not in line.

Q In other words, with this Stubner Case and the fact that you weren't employed otherwise, coupled with a drinking problem that existed then, did that have any effect upon your filing or nonfiling of returns at that time?

A That had an effect on my income. It was not necessary for me to file. In other words, I didn't have that much income. Now, this is a fact.

Q All right, sir.

A. And I might as well state, and—but in—

Q Incidentally, do you still drink now?

A No; I got a hold of this thing. Let's face facts. I guess, as much as anything else, I would like to "paint it"—it would be a little more pleasant, but I don't guess anything like that is pleasant,—well, in any event, I got a hold of this situation or this problem, and took care of it in 1952, and went into law practice with Goshorn and Kennedy Rippitoe, and that year, 1952, was the first year—well, for some time—that I made any income. Now, having not filed before, I didn't file, and I went to about—I kept on like that, and I put this thing off. I knew I had to do it because it obviously—you can't escape this thing.

Of course, I see now, from what I hear of the testimony, it was a possibility of the thing—of course, I didn't think I did—I had any possibility. I knew I was going to have to; from what the testimony was here. I guess maybe there was, but I had no idea then that sooner or later, with the law firm filing returns, —with Social Security being paid and all this, I knew that sooner or later; so I went to Dr. Garrett, who was a friend of mine and an accountant and had been in the Internal Revenue and was no longer working there, and I told Doc,—I said, "Doc,"—I told him my problem, and he said, "All right." He said, "When you get your stuff together, then we'll go down and make arrangements to get the money, and we'll go down and file these returns and explain the situation, and I think that will take care of it." And so, I of course, put that off, and then I got a request from the Government to state whether I had filed an income tax thing.

Q When was this?

A This was in 19—— — I don't remember the exact date.

Q Approximately?

A Oh, 1955 or 6—1956—1956, I believe.

A All right.

A It might have been '57, but anyway, it was sometime after I was working, so I went—I immediately went back to Dr.—Doc Garrett, to whom I talked, and told him. He said, "Well," he said, "the thing to do," he said, "let's go ahead and get these things filed and get this done, and just tell them what happened, and the reasons you didn't and your motives or

whatever it was." And so that's what was done. We went to the thing, and we filed them.

Q This Doc Garrett, is he the A. I. Garrett, whose name is typed and signed to these returns, '52 through '55?

A That's right. That's right—A. I. Garrett.

Q Now, what reasons at the time of filing, did you give the Government for not filing?

A Well, I told them just exactly—

Q What reason did you state on the return, or the affidavit appended to it?

A I had on here—it was put on here, "oversight" —I see, "oversight with no intent to violate the law or evade the payment of tax due."

Q Is that signed by someone other than yourself?

A That was accepted. Well, it was notarized before Richard E. Evans, Internal Revenue Agent, is it not?

A Yes, it was appended. I got that at the same time.

Q And to the '54 return?

A Correct.

Q The same fellow, Evans? Mr. MacCorkle, will you tell the Jury exactly what the situation was, to cause your late filing or non-filing for the time, in the years, '59 through '63, to be different from the years, '52 through '55?

A Well, actually, there's not any substantial difference, except for this,—that after,—after I filed—

after I filed these income tax, then, this gentleman came from the Revenue Office and stayed at my office for quite some time, and I did nothing—which was to be expected. I didn't know—

Q You're talking about the years of '52 on?

A That's right. He came and spent this time, and we went over everything—everything I could show him, everything I could think of, and—but it was a time-consuming proposition. It was no difference, and I knew that from what I gathered, that from then on, I would be checked pretty regularly. You knew—

Q And did you anticipate in this period of '59 through '63 that the Government would come in and check with you on this?

A I knew it. I mean; I just couldn't—

Q Were you prosecuted for the failure to file or the late filing in any of the years of '52 through '55?

A No. The Revenue Agent told me that he could —the first time, as a matter of fact, that I did some little practice, and he said, "I could file an information against you." The first time I heard of that was in Federal Court, and I just told him the circumstances, substantially what I've said here. Of course, I don't know. They would have a record of it. They know exactly what it was, but that's generally speaking. I had hoped, maybe I had forgotten, selfishly, some of the things that I had said, but in any event, I never asked him not to. I mean, it was up to him, and I just assumed that he thought that this was—that this was a valid proposition,—that I wasn't trying to do anything to anybody, and that was that—

Q Did you have any reason to suspect that you'd be treated differently this time, than you were in the former situation?

A Well, I not only—well, you would think the same thing would happen again. I mean, in other words, I'm sure that had I—this was a nice fellow, I guess—I'm sure that he believed me, and that was the truth that I told him, and I'm sure that he believed that I didn't try—that I wasn't trying to evade the taxes or trying to keep from paying them. I was just not doing it because it was me, and I'm sure that they got 25 percent in interest, and there's no way in the world that I could come out ahead on this. Now, here's the explanation of—when you do something, you try to figure the reason for it after you've done it, —why, you may have a different reason for when you did it, but I know, at the time I did these things and the time I didn't file, there was no intention on my part about filing or not filing. It was always a question of, well, do I do—so far as intending to file, anybody that's been through the experience I've been through with—of course, I'm foolish not to.

Q Well, did you intend to file these returns in 1963?

A There's no benefit that I could get by not filing.

Q None whatsoever?

A How could I? There's no way—none whatsoever.

Q As a matter of fact, all you'd do is receive a—you'd be assessed a penalty, and you'd lose? Is that correct?

A I had to lose. Now, it was a question, in these matters that I was working on at this time, there was a question in my mind in whether you take care of these private things or these things that deal with you personally, or do you do these other things? Well, it might not suit you exactly, personally. Maybe they are more important to you. Now, I don't offer that by way of an excuse. That is just a fact. I didn't intentionally or deliberately not file an income tax. I did something else.

Q I understand all this, yes. I asked you once before, and you didn't answer me. You said that your drinking had some effect on this '52 through '55. Did drinking have any effect through the '59 through '63 period?

A No; in 1952—I haven't had a drink since that time. Now, I don't want anything—anybody to think that this is the whole reason—no.

Q But drinking had no effect—you didn't drink during this '59—

A I haven't had a drink since I was—since I was forty years old.

Q How old are you now?

A Let's see. I'm fifty-four. I'm fifty-four. I haven't had a drink of anything since '54.

Q Now, aside from the penalty that you expected to lose and the interest; when these returns were filed, did you suffer any other loss as a result of this nonfiling at this time—late filing?

A You mean, have I suffered any loss by not filing this income—

Q Yes.

MR. UPTON: Your Honor, I am going to object to that question. I don't think it has any bearing on this Case.

THE COURT: What bearing does it have?

MR. AMICK: Your Honor, we're trying to show here that—to show that there's no wilfulness—there's no ulterior purpose—no bad purpose, Your Honor.

THE COURT: The issue we have here is wilfulness and you say that the detriments he had received, if any?

MR. AMICK: Those which he could reasonably anticipate and did get.

THE COURT: All right. Overruled. Let's move on.

MR. AMICK. Go ahead.

THE WITNESS: Yes, I suffered in about every way you can figure—financially, my reputation; I lost my election, which I will say—maybe I'm wrong about that, but I say that's the reason I lost.

Q (By Mr. Amick) But what about your home?

A Well, yes, in a sense. In other words, I haven't been able to carry on since this time in a way that I would normally have done.

Q Now, let me ask you this. You did file your returns for the years, '59 through '63 on September 30th, 1964? Is that correct?

A Yes.

Q What prompted you to file them at that time?

A A Revenue Agent—a Mr. Huddle, I believe, I have since learned. He came and called on me and asked me if I filed returns, and I said, " '63" or whatever year it was. I knew the purpose of this call. He had indicated to me, so when I said, "No, I haven't," and he said, "Did you file—"No, then I volunteered, I believe. I said, "No, I haven't filed"—for what ever year it was.

Q Where did he come to see you?

A At my home. He called me and asked me if he could meet me somewhere, and he'd come up there. It was in September. He indicated why he came. He said he came from a newspaper inquiry, and he told me why he was asking me—to be sure to check it out. See, where I—it's one of those things—you wake up in the middle of the night, you know, and you say you're going to do tomorrow; then, tomorrow comes, and somebody says, "How about doing this for you," or "How about doing this?" Then you don't do it. In other words, there was so much involved, once that I made the mistake and I didn't go and sign and go ahead and find that other income tax return, and not file that one. Then, each time, you have an accumulated proposition—not that I fully didn't intend to do it, but each time, it got bigger and bigger, and it was tougher to do, and I knew, sooner or later, that I was going to pay this penalty, and I paid it.

Q Now, what prompted you to file your returns when you did file them?

A Well, as a matter of fact,—while Mr. Huddle was there, you called me on the phone about another matter and I said, "John, are you busy?" and you said, "No," and I said, "Well, how about dropping

over here? I want to talk to you about something," and you came over and I said, "John," and I explained to you the circumstances. I don't know—and you said, "Let's get—" and you said, "Let's get John Fisher, and file these returns. That's the first thing you should do." I understood that if the returns were filed, we thought there was—we didn't think here was some law about the Government not being able to divulge this thing. That was my main interest at this time—to get them filed, so—because I had no idea of this.

Q As a matter of fact, John Fisher, you and I obtained the information, John prepared your returns, you signed them, and I took them to Parkersburg and filed them? Is that correct?

A That's right, yes,—and paid.

Q And it was at my instance that they were filed at that time?

A That's right.

MR. AMICK: You may inquire.

CROSS EXAMINATION

Q (By Mr. Upton) Mr. MacCorkle, I believe I heard Mr. Loop testify here earlier that he was your teacher in Junior High School. What other formal education did you have, sir?

A I was a High School Graduate, and a graduate of Law School.

Q Where did you graduate from High School, sir?

A Woodbury Forest.

Q Do you have a Bachelor's Degree?

A No.

Q You went directly into Law School after a couple of years of Undergraduate School?

A No. I went to Princeton,—let's see, Princeton, and then to Washington and Lee and then, was going to West Virginia to Law School, and went up there and found out that I had to have a course;—I went to school up there a year, and found that I had to have a course of English—oh, no, R.O.T.C., which would require another year before I could enter Law School, so I went back to Princeton and got some more credits, and no, I had hepatitis, and so, then, I went back to Princeton and finished and went back to Washington and Lee, and then went back to Law School. I have the hours for a degree, but never the combination of one.

Q So you went to Princeton University and ultimately ended up at Washington and Lee for the Law Degree? What year was that, sir?

A 1940.

Q I take it that you were required to take the Bar Examination in the State of West Virginia? Is that correct?

A I was.

Q And you successfully passed the Bar exam, I presume,—and when were you permitted to practice law in the State of West Virginia, sir?

A 1940,—September.

MR. AMICK: We will stipulate that the Defendant is intelligent and doesn't have any mental prob-

lem or block, or one way or the other, if that's what you are after.

MR. UPTON: I just wanted to establish the fact that Mr. MacCorkle was an attorney, and I think I have. Now, Mr. MacCorkle, as I understand it, you were appointed sometime prior to 1959, as Commissioner of Accounts in Kanawha County? Is that right?

THE WITNESS: That's right,—in 1952.

Q (By Mr. Upton) In 1952, you were appointed by the County Court as Commissioner of Accounts?

A That's correct.

Q And basically, the duties of the Commissioner of Accounts are to administer the estate of decedents and to make settlements in regards to those estates? Is that right?

A That's right.

Q In other words, supervise the action of the executor and executrix and disperse the funds or approve the dispersement of funds?

A On a State level.

A That's correct.

Q As I understand it further, you were then appointed Assessor, I believe you said, on January 1st of 1959? Is that correct?

A Correct.

Q Now, Mr. MacCorkle, it's true, is it not, that the Assessor of Kanawha County is charged under the law with the duties of assessing the real and per-

sonal property taxes for each and every citizen of the County of Kanawha? Is that correct?

A No, that's not quite correct. The assessment is made of property. You place a value on property. Now, there is no question but what—whether you raise or lower the—whether the assessment would raise or lower the taxes but you have nothing to do with taxes and with that particular tax, which was a property tax. You do have—

Q In other words, the rate is set, but the Assessor places the value on the property? Is that right?

A That's right, and the rate is set by the County Court, and the Sheriff collects the taxes.

Q And the Sheriff collects the taxes after the books have been certified by the County Court to the Sheriff? Is that correct?

A Now, you do collect tax, of course.

Q Right. I'm going to get into that next. It's my understanding that the actual physical collection of taxes has to do with the collection of some kind of Dog Tax. I do not—on the Dog—I'm not familiar with that tax, but the Dog Tax and the Head Tax are a former Poll Tax or whatever you want to call it?

A The Capitation Tax is an anachronism and should be abolished. It's tax on all males, either twenty-one or over. It's a ridiculous tax. It takes up lots of time of the Assessor, and I did everything I could to get rid of it, but strangely enough, I couldn't get any help on it, because it jumped on me, because that's where I got my pay, from this Capitation Tax, and they couldn't understand, I guess, anybody that

would want to turn down money, so I couldn't get very far with it.

Q That is—you mentioned this—that is the biggest source of income for the Assessor in this particular County? Is that not true? That's a true statement, is it?

A Yes, and that's the reason that because—and since this County has the biggest Capitation, collects the biggest Capitation Tax,—that's why it was so important that I take the lead on getting the Capitation Tax abolished, because that's a—now, boys, I'll lose more money than anybody—any of you, see?

Q I understand your salary by the County Court was what?—$7,500.00?

A $7,500.00.

Q And the balance of your income was from Capitation and Dog Taxes? Is that correct?

A Yes.

Q And some small items, which you enumerated earlier?

A Yes.

Q. Now, as I understand, the Capitation Tax as it's administered by the Assessor—while you were Assessor, your deputies went to an individual's house to make the assessment on their real and personal property, and at that time, they undertook to collect the Capitation Tax; is that correct,—or told them how much was owed, and solicited that they pay the funds? Is that correct?

A That would be one way to do it, or several ways it's done. See, this tax goes to the schools. It's not a

substantial part of their income, really. The rural sections you get a $1.00 for the State road. See, this is in the Constitution. You get a $1.00 for the State roads; you get a $1.00 for the schools, in urban areas. They usually added $2.00—the City of Charleston had $2.00; so, for the municipalities, you collected $4.00; in the rural areas, you collected $2.00. You got 10 percent, when you get 20 cents on the other 40 of each one collected.

Q In other words, the Assessor received 10 cents on the $1.00 collected,—is that correct?

A That's right, on what they collect.

Q So, it was—you had an income of approximately $20,000.00 a year? It would be safe to say that better than half of your income came from the collections?

A Two-thirds of it.

Q Two-thirds of it came from that? Now, there's been testimony in the record here today—in the County Court Office, a W2 Form was forwarded to the District Director of Internal Revenue, reflecting what taxes had been withheld. Now, it is also true, is it not, that there was no money remitted from the Capitation Tax, to the Director of Internal Revenue for your withholding?

A No.

Q In other words, there was no withholding from that money? You got every penny of it that you were paid?

A Yes. Now, in a sense, there was a tax on more than my salary there, because I had—I had three ad-

ditional exemptions from the withholding tax. I did not do that because I wanted to, when my tax was filed, I wanted just—this to build up in it, over and above what the $7,500.00 was, so as a consequence, I did pay something on this other income. You see—in other words, had I just paid—I mean, had I taken more than one exemption, which I didn't take at any time during this period,—well, I would have paid exactly—I would have just have paid on my salary, but as it turned out, I paid extra which would be paying part on the other.

Q All right, Mr. MacCorkle. Since you brought this particular item up, I am looking at your 1959 tax return, which was filed by you. Taking the figures from that return, is it true that the returns reflect there was a tax due on your gross income or net income, I should say, $4,460.88, of which only $1,312.44 had been withheld?

MR. LOVE: I think you'd have that.

MR. AMICK: We'd just admit that what's in the return is true; unless there's some incorrect statement in that return, I think it speaks for itself.

THE WITNESS: That would be true.

THE COURT: You are asking about a figure that's reflected on the return, are you not?

MR. UPTON: That's correct, Your Honor. Aside from the stipulation, I am inquiring about these particular returns.

THE COURT: All right, overruled—overruled.

Q (By Mr. Upton) This is not including penalties, assessments, or interest or anything of that nature; I'm speaking only of taxes.

A Federal Income Tax withheld $1,312.44.

Q And the total tax liability?

A $4,460.88.

Q And if my mathematics are correct, that means that the amount of $3,148.44 had not been paid by the year 1959?

A But some of it had been withheld.

Q No, that is deducting withholding from the amount of tax owed?

A No, see, the withholding there was deducted with one exemption. Here, the tax is on four exemptions.

Q I see.

A In other words, the $7,500.00—in other words, part of this $1,312.44—that covers part of my income—other income, whatever it might be. In other words, I lost three exemptions on this $7,500.00.

Q Isn't it true, though, that your children were not claimed as exemptions because they were receiving their support from their grandfather?

A That's right.

Q So they would not have been proper exemptions? Is that correct?

A Yes—may I explain that?

Q Well, answer my question, and then, you can explain it, if you will.

A O.K.

MR. AMICK: I think he said, "Yes," Your Honor. I believe he'd be entitled to explain his answer.

MR. UPTON: I'm sorry, I didn't hear his answer. He certainly may explain.

THE COURT: You may explain.

THE WITNESS: All right, sir.

MR. UPTON: Perhaps this is what you're looking for, Mr. MacCorkle. I find that my question was a bad question. My understanding was, it was only during the year of 1963—my statement would be, if it's for 1963, my statement would be correct? Is that not true?

THE WITNESS: I'm looking to see. Just one moment. Yes, that's correct. Now, here's how that came about. In 196— —for the year, 1963, my father-in-law sent my daughter and my son to school, and they both went to school—boarding schools, and those schools—in that case, a situation like that, then the tuition cover board, room and these different things, and he was paying more than half of their subsistence, more than half their living cost. All right,—because I remember this so well—I remember when he called me, he said, "Now, Sam is there any reason why I shouldn't claim—"

MR. UPTON: I don't think that's important.

THE WITNESS: I think it is important, because you're inquiring into my state of mind.

MR. UPTON: You haven't been responsive to my question.

THE COURT: Sustained. What he might have told you,—I don't think that is responsive. Sustained, on that point.

Q (By Mr. Upton) Well, Mr. MacCorkle, without going through each one of these particular years, is it not true that, during the years, '59 through '63, that subtracting what was withheld from your salary from Federal Income Taxes and that which you show on those returns that you owe, that you still owe the Government a figure in the amount of $16,504.86? Now, I appreciate you to have to compute all this, but wouldn't you say that this is an accurate figure by estimate?

A No, not in my estimate, because in my estimate, I also owed the Government, which I hadn't experienced before, 25 percent and 6 percent interest on that balance was not paid.

Q Is it not true that you had in excess of $16,000.00 to use during the period of 1950 through 1963, to which the Government was properly entitled at the end of each tax year, interest free for that period? Is that not true?

A Certainly, that's considered to be true, but the fact is, I didn't use it.

Q You put this money in an escrow account?

A The money was available any time the Government wanted it. I paid these taxes a month after I filed the return. These taxes were fully paid, so the money was apparently there.

Q But you had the money. The Government didn't have it.

A Well, I mean, the Government was paid as soon as I filed the returns. They had been paid this other amount. I mean, I don't quite—if you mean, did

I use this in any business of any kind to make any money off of, no.

Q I don't know what you did with the money, Mr. MacCorkle, but you did have this $16,000.00 to which the Government was entitled to? Is that not correct?

A Oh, yes, I had it. I mean, it was paid. Do you mean, are these returns correct, insofar as my salary, and so forth, are concerned?

Q I think you've already answered my question. I think we're starting an argument here.

A I beg your pardon.

Q Now, Mr. MacCorkle, is it not true, or is it true that you used the cash in your cash drawer in the Assessor's Office as collected by your deputy assessor's Office as collected by your deputy assessors and citizens of this County for your own personal use and inserted in lieu of the cash which you removed, IOU's and your checks with the understanding that these checks were not to be deposited?

MR. AMICK: I object to this question, Your Honor.

THE WITNESS: I can answer it.

THE COURT: Do you want to explain it?

THE WITNESS: I certainly want to explain an implication like that. Yes, see, you collect this money. I get 10 percent of it—of it's mine,—in other words, when it's collected. Now, insofar as having—well, all of it's mine when it's collected. In other words, I am responsible for the whole amount. There is no official bank account. The bank account was my bank account. The only thing that a bank account was used

for was for the purposes of receipts. In other words, I could have kept all, and the only IOU's and the checks that I put in the thing, were to keep this thing —becoming identified with the wrong thing; put cash in—check or cash—now, there never was a time that I put in money that I didn't have the money coming to me.

Q (By Mr. Upton) So, in other words, you are telling this court and this Jury that the Assessor's Office of Kanawha County has no official Assessor's account in any bank?

A That's exactly what I'm telling you—that any bank account in which I deposited money was my bank account.

Q And you collected the taxes, and you considered that was your money, and you put it in your personal bank account?

A It went into an account designated as an Assessor's account. This is the case. I was under bond. The money—the money was collected by the deputies and was turned over to me, and I was responsible for it. When I wanted to withdraw it, that was the way it was done.

Q Well, Mr. MacCorkle—

A Do you have any—

Q Is it not true that on or about July 3rd of 1963 after a sale of stock to Margaret Blaine Chamfort that you reimbursed the Treasurer's Account or the Assessor's Account, a figure in excess of $8,000.00 in cash to cover IOU' and checks which you had put in this cash account and taken out of the cash account?

A I don't remember, but this is my account. From time to time, I put money in the thing.

THE COURT: Now, Gentlemen, we're going to have a question and then an answer. Our Court Reporter—when you both speak at the same time, he just can't very well report it.

MR. UPTON: I apologize, Your Honor.

MR. AMICK: Your Honor, I object. I don't know what the purpose is, but I object to any stigma being attached to some finagling being attached to his own bank account, unless the District Attorney can show where it was not a private bank account. Certainly, I would have no objection there.

THE COURT: I think perhaps Mr. Upton disagrees with him, whether it was or was not in his own bank account. I gather that, and I gather this is for the purpose of impeaching, if it should reflect that. Is that your purpose, Mr. Upton?

MR. UPTON: In part, Your Honor. The purpose of this Defendant being on the witness Stand is Cross Examination, and he has put his character in issue, and I think it is proper procedure to inquire about the practices in regard to his character, and so forth, in his office.

THE COURT: You have much liberality on Cross Examination. You go ahead.

Q (By Mr. Upton) Now, MacCorkle, moving on to the tax returns, which you did not file timely in 1952, '53, and '54, it is my understanding from your testimony that you filed these returns, after you received a notice from the District Director inquiring

about your 1954 tax return or some particular tax return? Is that correct?

A I—if my memory serves me, that is correct.

Q And after you received this notice, then, you appeared in Mr. Evans' office and advised Mr. Evans that you had overlooked this or it was an oversight and that an affidavit was prepared and you signed it, and it was appended to your tax return? Is that correct?

A Yes.

Q Doc Garrett was with you when you filed these delinquent returns? Is that correct?

A I don't remember.

Q In any event, you were present and filled out that affidavit, which Mr. Evans notarized? Is that correct?

A That's correct.

Q All right, sir. Now, Mr. Evans at no time told you that it wasn't necessary in the future, to file a tax return, did he—that they could always be handled in the way these were handled?

A Well, I don't know that I ever talked to Mr. Evans after that, but certainly, nobody told me that anything that I did at that time wouldn't be handled the same way in the future. In other words, I—

Q But nobody told you it would be handled in the future the same way it had in the past, did they?

A Well, I just assumed they would be handled the same way.

Q All right, sir. I believe your testimony is further, that in regard to the returns from '59 to '63, that they were filed, after you were contacted by a Revenue Officer? Is that correct?

A Yes.

Q And it's true, is it not, Mr. MacCorkle, that the '55, '56 and '57 returns were filed timely by you? It is all true—and I've forgotten which return it is and perhaps you remember, that in one of those returns, you remitted the tax showed on there as required, and one other year, you remitted part of the tax, and in the other year, you remitted no tax? Is that correct? I've forgotten which year was which.

A I knew that you could file a tax return without paying the taxes, if that's what you mean.

Q Now, in regard to the—your charge in this indictment, Mr. MacCorkle, it has been agreed here by stipulation that you had in excess of $600.00 income, and that you did not timely file these returns? Now, I believe you have further testified that you knew you had to file the returns? Is that correct?

A I knew I was going to file them sooner or later.

Q Did you know that the law requires you to file the tax?

A Yes, sir.

Q Did you know that it is a violation of the law not to file a tax return timely?

A A violation of the law in the sense that I knew I—that the law said you file them and if you don't file them, you're charged 25 percent.

Q You didn't know there was any criminal violation for the failure?

A I knew there could be a criminal violation, but you have to have criminal intent.

Q You knew it was a violation of the criminal law not to file a tax return?

MR. AMICK: I object to this, Your Honor. I don't believe that's an accurate statement of the law.

THE COURT: Sustained.

Q (By Mr. Upton) I'll rephrase the question. Did you know it was a violation of the Federal Criminal Law to fail to file a tax return, when you had income in excess of $600.00 on or before April 15 in the later years with wilful intent?

A I didn't know about wilful and that sort of thing at that time, but I did know that if you did it for some—I assumed if you did it for some bad deal.

Q In other words, you were generally acquainted with the fact that there was some kind of a law involved here that you might be violating, if you didn't file a tax return?

A I knew from what the Revenue Agent had said to me before.

Q Isn't it true that Doc Garrett told you that?

A The Revenue Agent—it wasn't Doc Garrett; it was the Revenue Agent.

Q Doc Garrett never advised you that you might go to jail or anything of that nature, for failure to file your income tax?

A He said, "Go in and pay your 25 percent and your penalty and get these things filed."

Q He never mentioned criminal penalties to you?

A No.

Q All right, sir. Mr. MacCorkle, you knew, during the years, '59 up to '63, that you hadn't filed a return? Is that correct?

A Yes, I knew I hadn't filed.

MR. AMICK: It's getting repetitious, Your Honor, and I object. He's said this several times, Your Honor. He's admitted all along that—he admitted he didn't file.

THE COURT: Sustained. Sustain the objection.

MR. UPTON: I was going to change the question, Your Honor.

THE COURT: Go ahead.

MR. UPTON: I was going to ask you if you knew if the United States wasn't getting your income tax return, unless you filed it?

MR. AMICK: Now, Your Honor, he's obviously known that.

THE COURT: Overruled. Go ahead.

Q (By Mr. Upton) In other words, no one else was going to prepare it for you and file it? You knew that, didn't you?

A I knew if it was filed, I'd have to sign it.

Q And this was a deliberate choice on your part, not to file?

A No, it wasn't a deliberate choice on my part, because for this reason; I never at any time had any other intention except to file an income tax return. There never was at any time. The only reason—my purpose was to file an income tax, but the thing about it is that I was doing something else, and you had a choice between doing two things and I did one rather than the other. In other words, you can't have a deliberate—I didn't go out and deliberately say, "I will not file that income tax, and I'm not going to do this." I had every intention of filing this income tax, and there's not anything that I can see that would indicate otherwise.

Q In other words, would it be a fair way of summarizing your statement this way and saying that you were too busy collecting the taxes from the citizens of Kanawha County and managing political affairs in this City and County to bother with filing your Federal Income Tax?

A No—

MR. AMICK: Objection.

THE COURT: Overruled. He wants to answer the question.

THE WITNESS: No, that wouldn't be a fair statement. I had no time, from the time that I didn't file this income tax, and knew it was very far from my mind. I knew I was going to have to do it sooner or later. I knew that this—I knew this, but once that you do—if you put it off once, you put it off and put it off until it assumes a proportion that each day it is harder to do because there's more to it. Now, it's not for anybody—it's not a pleasant task to say the least.

Now, it's not for anybody;—it's not a pleasant task to say the least. Now, here when I thought I was doing something—whether it's false or not—I want to be as modest as possible, but I thought that I was doing certain things that were important, and I was trying to do them and do them well. Well, naturally, you rationalize about these things, and you say, "I'll put off this thing; it's rather unpleasant—as long as I am doing something that's important." And very little of it made very little difference to me. I wasn't making any money, and what I was making,—very much of it was going back into these, what I thought was good works, but I don't know. That's my opinion.

Q (By Mr. Upton) I'll agree that paying taxes is not very pleasant.

A No.

MR. AMICK: I move to strike that, Your Honor, the statement of Counsel.

THE COURT: Motion allowed.

REDIRECT EXAMINATION

Q (By Mr. Amick) Sam, does the law of the State of West Virginia or the Constitution of the State, to your knowledge, require you or any other Assessor to keep any monies collected through your office, in any particular accounts?

A No.

Q There is no such thing, is there?

A No. The only account that you have, you could pay all of these things as far as I know, by cash. The only reason that you have a checking account—as a matter of fact—well, I won't go into that.

Q What is your reason for having a checking account?

A The reason you have a checking account is to receipt these things so that when you do pay them, well, you pay—you pay these that you have a receipt for.

Q But there is no requirement for you to have any official account anywhere? Is that correct?

A I never had one. I was there six years and under bond.

Q And any—any—ever any money missing down there?

A There is nobody that wasn't paid on time. There was never any money—there never was any money missing. Of course, there were some petty things.

Q Is that through the State of West Virginia?

A Through the State of West Virginia.

Q Now, as a matter of fact, your office as Assessor—did that require you to have any knowledge, particular, one way or the other about income tax laws or the State or Federal Government?

A You didn't have—you didn't have to have any knowledge, no.

Q You had no dealings with income tax as such, as an Assessor?

A No.

PETITIONERS REQUESTED INSTRUCTIONS NOS. 3, 5, 6, and 9.

3. The Court instructs the jury that the law presumes the defendant, Sam L. MacCorkle, to be innocent until he is

proved guilty as charged in the indictment by the Government, by evidence beyond all reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with his innocence. This presumption of innocence goes with the defendant throughout the entire trial, and applies at every stage thereof, and if, after having heard all of the evidence in the case, the jury have a reasonable doubt of the guilt of the accused upon the whole case, or as to any fact essential to prove the charge made against him in the indictment, it is their duty to give the defendant the benefit of the doubt and find him not guilty. Mere suspicion or the probability of the guilt of the defendant, however strong, is not sufficient to convict, nor is it sufficient if the greater weight or preponderance of the evidence support the charge in the indictment, but to warrant his conviction his guilt must be proved by the evidence beyond all reasonable doubt.

This presumption of innocence is so strong that if the case against the defendant be a doubtful one, the presumption is always sufficient to turn the scales in favor of the defendant.

45 W. Va. 65, 30 S. E. 216-159 Va. 923, 166 S. E. 541.

5. The Court instructs the jury that every fact necessary to constitute the offense charged must be proven beyond a reasonable doubt and that if there is a reasonable doubt as to any such fact, you shall acquit; that the result of the evidence must be to exclude every reasonable hypothesis of innocence, and be consistent only with the guilt of the accused; that the jury is not at liberty to guess, and where a fact is susceptible of two interpretations, one of which is consistent with innocence of an accused, they cannot arbitrarily adopt the interpretation which incriminates him.

142 Va. 655, 128 S. E. 459.

6. The Court instructs the jury that if you believe there is any conflict as to any material evidence, in this case, a part of which tends to establish the innocence of the accused, and a part of which tends to establish his guilt, and the jury has a reasonable doubt as to which is true, the jury is instructed that it is your duty in that event, in arriving at your verdict, to adopt the evidence, theory and conclusion which is most favorable to the defendant, since the defendant is entitled to the benefit of every reasonable doubt as to his guilt or innocence of the crime charged against him.

89 W. Va. 301, 109 S. E. 326.

9. The Court instructs the jury that if there is any one essential fact proved to the satisfaction of the jury which is inconsistent with guilt of the defendant, this is sufficient is raise a reasonable doubt, and the jury should find the defendant not guilty.

47 W. Va. 267, 34 S. E. 734.

PETITIONERS REQUESTED INSTRUCTIONS NOS. 10, 11, 12 and 13.

10. The Court instructs the jury that the Indictment returned against the defendant Sam L. MacCorkle in this case charges five separate and distinct offenses. First, that he willfully and knowingly failed to file his income tax return for the calendar year 1959 on or before the 15th day of April, 1960; second, that he willfully and knowingly failed to file his income tax return for the calendar year 1960 on or before April 15, 1961; third, that he willfully and knowingly failed to file his income tax return for the calendar year 1961 on or before April 15, 1962; fourth, that he willfully and knowingly failed to file his income tax return for the calendar year 1962 on or before the 15th day of April, 1963; fifth, that he willfully and knowingly failed

to file his income tax return for the calendar year 1963 on or before the 15th day of April, 1964.

The elements of each of the five offenses charged in the indictment that the Government must prove to your satisfaction beyond all reasonable doubt are as follows:

First that the defendant's income was sufficient in each of the said years, that is it was in excess of $600.00 in each of said years, to require him to file a return. It has been stipulated in this case, and thus it is admitted by the defendant that his income was sufficient in each of said years to require him to file an income tax return. Second, that the defendant knew or should have known that he was required to file an income tax return in each of the said years. Again, it has been stipulated and the defendant thereby admits that he knew he was under a duty to file such returns at the times hereinabove referred to. Third, that he failed to file such returns timely. Again, it has been stipulated and the defendant admits that he failed to file such returns timely. Fourth that the defendant's failure to file his returns timely was wilful. This element of the offense is denied by the defendant. Therefore, the sole issue for your determination as to each of the offenses charged in the Indictment is whether or not the defendant wilfully failed to file his returns on time.

In considering whether or not the defendant wilfully failed to file his income tax returns as charged in the Indictment, you should not ignore or overlook the word "wilful" nor its meaning. A wilful failure to perform an act is to omit the doing of such act with an "evil motive" or "bad purpose". Mere laxity, inadvertence careless disregard of the duty imposed by law, negligence, or even gross negligence on the part of the defendant, unattended by evil mo-

tive or bad purpose, is not sufficient to establish the element of wilfullness.

Therefore, unless the Government has proved that the defendant's failure to file his returns was wilful, to the exclusion of every reasonable doubt, you must find the defendant not guilty.

United States vs. Palermo
259 F2d 872.
Lumetta vs. U. S.
362 F2d 644
U. S. vs. Vitiello
363 F2d 240.

11. The Court instructs the jury that before you may find that the defendant's conduct in failing to file his income tax returns timely was wilful, it is essential that you first determine that his motive was evil, and that he failed to file them for some bad purpose.

Evil motive is defined as that which leads or tempts the mind to indulge in a criminal act or omission, or as the moving power which impels for a definite result. Bad purpose is the result intended to stem from an evil motive. Evil motive and bad purpose are facts that may be inferred by you, not merely from the circumstances attendant to the defendant's omissions, but, in conjunction with these from all previous occurrences having reference to, and connected with, the offenses charged in the Indictment.

Therefore, you are further instructed that if, after having heard and considered all of the evidence in this case you have a reasonable doubt as to the existence of, or are convinced of the absence of an inducing evil motive and bad purpose for the defendant to commit the offenses charged in the Indictment, you must find the defendant not guilty.

United States vs. Palermo
259 F2d 872.
Lumetta vs. U. S.
362 F2d 644.
U. S. vs. Vitiello
363 F2d 240.

12. The Court instructs the jury that although the defendant, Sam L. MacCorkle, admits that he was required to file the income tax returns alleged in the Indictment, that he knew he was required to file them, and that he failed to file them within the time prescribed by the law, and the jury believes that his failure to file his returns timely was caused by his laxity, negligence, gross negligence, inadvertence, or that it was intentional and without legal justification on the part of the defendant, nevertheless, if you have a reasonable doubt as to whether such failure was prompted by an evil motive or bad purpose on the part of the defendant, then you must return a verdict of not guilty in this case.

United States vs. Palermo
259 F2d 872.

13. The Court instructs the jury that although the defendant repeatedly failed to file his income tax returns for the year 1959 through 1963, thereby establishing a pattern of conduct, you are further instructed that these failures, singly or cumulatively, do not under the law establish the evil motive or bad purpose which are the requisite elements of wilfullness, and without additional evidence to establish such evil motive or bad purpose beyond a reasonable doubt, you must return a verdict for the defendant of not guilty.

United States vs. Palermo
259 F2d 872.

RELEVANT PORTIONS OF PROCEEDINGS BEFORE DISTRICT COURT ON MOTION TO TRANSFER ON APRIL 4, 1966

JUDGE MAXWELL: The next matter we have on the docket today is United States of America vs. Sam L. MacCorkle.

MR. AMICK: Your Honor, Mr. MacCorkle is here today, and our purpose is to be here to answer the indictment, although we do not desire to enter a plea today, if we can put that off until later.

We have one motion this afternoon, and in addition to that, we have two other attorneys in the case who were not able to be present today, Mr. Love, of Charleston, and Mr. Fisher, of Charleston. At this time I would like to make a motion. I can say this, Your Honor: I prepared this motion not only in the form of a motion, but also in the form of an order, having talked to Mr. Kamlowsky previously some weeks ago, and at that time I had been led to believe that there would be very little objection to the motion.

JUDGE MAXWELL: Have you received a copy of the motion, Mr. Kamlowsky?

MR. KAMLOWSKY: If the Court please, I have received a copy of the motion this morning, and there was a similar case in which a similar motion was presented to one of the Judges in this District approximately four months ago; and in view of that case, the government would appreciate time to review this motion.

JUDGE MAXWELL: Very well, how much time would you need or want in this matter?

MR. KAMLOWSKY: The way the schedule is, approximately two weeks.

JUDGE MAXWELL: All right. Very well, the motion may be filed, and if the United States desires to file anything in opposition to it, that may be done either in Court or by letter; and then, when the issue has been drawn, and the Court has had an opportunity to determine the issue, we can come back into Court at a later date.

MR. AMICK: Thank you, Your Honor.

I assume now, should the United States Attorney desire to note an objection to this motion, he will so inform the Court, and then the Court would have no objection to having the order entered, without—

JUDGE MAXWELL: I don't know what the motion is. I haven't read it.

MR. KAMLOWSKY: If the Court please, this particular motion is to have this case transferred to the Southern District of West Virginia, since the defendant is a resident of the Southern District of West Virginia.

MR. AMICK: Yes, Your Honor, all the parties connected with this case, including the attorneys, with the exception of one who is a special agent from the Internal Revenue Department, are living in Charleston, or the Charleston area, and we believe it would benefit the ends of justice, as well as the parties and all counsel, and so forth, to have it in the Southern District.

JUDGE MAXWELL: Well, I will have to look to the law on this and see.

MR. AMICK: Yes, Your Honor.

JUDGE MAXWELL: If this is failure to file charge—

MR. AMICK: Yes, sir.

JUDGE MAXWELL: Wilful failure to file charge, and on the fraud cases I notice a statute on that, and I am not too sure here at the moment whether that general statute covers this type of case or not.

MR. AMICK: If the Court desires defendant's counsel to furnish some law, we will be glad to do so.

JUDGE MAXWELL: I would appreciate that; that would be very helpful. I will be very glad to have counsel furnish what they can develop for the Court; it will be helpful, and I will have you exchange your notations in this regard with each other.

MR. AMICK: Very well. In that case, the Court will notify us and Mr. Kamlowsky whether it will be necessary for us to appear here again?

JUDGE MAXWELL: All right; I will have you present your authorities within the next week.

MR. KAMLOWSKY: If the Court please, would that also include the government, the next week?

JUDGE MAXWELL: You will need some time to reply?

MR. KAMLOWSKY: Yes, sir.

JUDGE MAXWELL: How many days after the week would you like to have?

MR. KAMLOWSKY: Approximately one week, Your Honor.

JUDGE MAXWELL: All right, that will be fine. And then, after I have had your authorities, I will be glad to read them and study them, and advise the parties whether we will have a further hearing on it.

MR. AMICK: Thank you, Your Honor.

JUDGE MAXWELL: We might just let the record show the presence of the defendant throughout these proceedings. You may have mentioned it, or maybe we just knew.

MR. AMICK: Thank you, Your Honor.

JUDGE MAXWELL: Very well.

RELEVANT PORTIONS OF PROCEEDINGS BEFORE DISTRICT COURT ON MOTION TO TRANSFER ON JANUARY 31, 1968.

JUDGE MAXWELL: All right, the next case we have is United States versus Sam L. MacCorkle.

MR. JOHN A. AMICK: Your Honor, I represent the defendant—

JUDGE MAXWELL: All right.

MR. AMICK: And he is present in Court this morning.

JUDGE MAXWELL: All right, sir.

MR. AMICK: I have received a certified copy of the indictment returned, and prior to this morning I had discussed this matter over the telephone with the District Attorney and told him that I intended to make a motion to transfer this proceeding to the Southern District; and upon his advice that he did not intend to oppose this motion, I have prepared a motion and order granting the relief prayed for all in one paper, Your Honor, and I would like to tender that. Mr. Kamlowsky has seen it.

JUDGE MAXWELL: All right, sir.

Mr. Kamlowsky?

MR. KAMLOWSKY: No objection, Your Honor.

JUDGE MAXWELL: It seems that the change in statutes in the last, I will say, eighteen months, to be safe about

it in the time period, is such that a transfer of this type of case is not only appropriate, but desirable, and within the ambit of Congressional intent. We used to, of course, operate solely on the provision that statutory transfers are authorized only in fraud types of cases, but change of statutes also include the cases falling under Section 7203.

So the Court, in considering this motion, will grant the motion, and the order is entered as of this date, transferring this matter to the Southern District of West Virginia, as prayed for by defendant, and which is the residence of the defendant.

MR. AMICK: Thank you, Your Honor.

Now I might ask Your Honor, further, if you would desire the defendant to execute a recognizance at this time, or—

JUDGE MAXWELL: I don't think. I think the better procedure here is to recognize the defendant to be in your constructive custody, as an officer of the Court of this and the Southern District, to appear before the Southern District at such time as that Court can issue a summons for his appearance.

MR. AMICK: That you, Your Honor.

JUDGE MAXWELL: He is recognized to appear, and be in your custody.

MR. AMICK: Thank you, Your Honor.

DISTRICT COURTS CHARGE TO JURY

PROCEEDINGS

THE COURT: Ladies and Gentlemen of the Jury, if I should get, during the course of my Charge to you, where you do not hear me, raise your hand and I will know that you are not hearing me. I will try to speak loud enough that you can, but sometimes, when you get interested in trying to cover the facts, and the law in the matter, I tend to let my voice drop.

You have heard the evidence in this Case and the argument of Counsel, and the time has come for me to instruct you with respect to the principles of law which should guide you in your deliberations. Although you as jurors are the sole judges of the fact, you are duty bound to follow the law as stated in these instructions of the Court, and to apply the law as given to you by me, to the facts as you find them to be from the evidence before you. You are not required or are not governed by any statement made by the attorneys for either side, during the progress of the trial or during arguments to the law governing the Case, but as stated, you are bound to follow the law as given you by the Court. Further, you are not to single out any one instruction alone as stating the law, but you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law, regardless of any opinion you may have as to what the law ought to be. It would be a violation of your solemn duty to base the verdict upon any view of the law other than that given to you in these instructions. You will be permitted to carry into the Jury Room, a copy of the indictment in this Case. I will not read the indictment in its entirety, but will read again as I did at the outset, when we started this Case, the first Count:

COUNT I charges "That during the calendar year 1959, SAM L. MacCORKLE, who was a resident of Charleston, Kanawha County, State of West Virginia, had and received a gross income of Twenty One Thousand Five Hundred and Twenty Dollars and Thirty-Seven Cents ($21,520.37); that, by reason of such income, he was required by law, after the close of the calendar year 1959 and on or before April 15, 1960, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of West Virginia, at Parkersburg, West Virginia, in the Northern District of West Virginia, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U.S.C., Section 7203.

And then, COUNT 2, with the same language, except it covers the year, 1960;

COUNT 3, the same language except it covers the year, 1961;

COUNT 4, the same language except it covers the year, 1962;

COUNT 5, the same language except it covers the year, 1963; and when I say the same language, why, of course, the dates as to the time the return was due and the amount of the gross income is different in each count, as you will observe from a copy of the indictment, which you will be permitted to carry with you to the Jury Room. The Court instructs you that the indictment returned against the De-

fendant in this Case, charges five separate and distinct offenses:

1. That the Defendant wilfully and knowingly failed to file his income tax return for the calendar year, 1959, on or before the 15th day of April, 1960;

2. That he wilfully and knowingly failed to file his income tax return for the calendar year, 1960, on or before April 15th, 1961;

3. That he wilfully and knowingly failed to file his income tax return for the calendar year, 1961, on or before April 15th, 1962;

4. That he wilfully and knowingly failed to file his income tax return for the calendar year, 1962, on or before the 15th day of April, 1963;

5. That he wilfully and knowingly failed to file his income tax return for the calendar year, 1963, on or before the 15th day of April, 1964.

Each Count of this indictment is drawn under Section 7203 of the Internal Revenue Code of 1954, which provides in its pertinent parts as follows:

"Any person required to make a return, who wilfully fails to make such return, at the time required by law, shall in addition to the other penalties provided by law, be guilty of a misdemeanor, and upon conviction thereof, shall"— and the Section sets out the punishment, which you are not concerned. As used in this Statute to which I have just referred, the word, "return" includes the Federal Income Tax Return. Now, in order to sustain the allegations that are contained in the indictment, it is necessary for the Government to establish beyond a reasonable doubt, these elements:

1. That the Defendant was required by law to file an income tax return for the years, 1959, 1960, 1961 and 1962 and 1963 — that those are the taxable years charged in the indictment;

Secondly, — the second element is that he failed to file an income tax return for each of those years within the time required by law;

And Thirdly, — that the failure to file such income tax return was wilfully and knowingly done.

Ladies and Gentlemen of the Jury, all three of these elements as to each Count are necessary to be proved by the Government beyond a reasonable doubt, and the failure on the part of the Government to so prove any one of these elements as to any particular year, would make it necessary for you to find the Defendant "not guilty," as to that particular year.

Now, with reference to the first essential element, which the Government is required to establish beyond a reasonable doubt — that is, that the Defendant was a person required by law to file an income tax return for the taxable years set out in the indictment, you are instructed that it is stipulated that the Defendant was required to file by law, income tax returns for the years set up in the indictment. In other words, the Defendant does not deny — in fact, he admits that he did not file the returns for those years, so that element is really not an issue and not for your decision. It's admitted that he did not file. With respect to the second essential element, which the Government is required to establish beyond a reasonable doubt, — that is, that the Defendant failed to file timely an income tax return for each of the years charged in the indictment, — also, this element has been stipulated to, and the Defendant admits that he did not timely file his returns for either of the years set out

in the indictment. Now, the third element is where the controversy is in this Case — the third essential element which the Government is required to prove beyond a reasonable doubt, in order to establish the offense charged in the indictment is that the Defendant failed to file the income tax returns within the time required by law; that that failure was wilfully and knowingly — now, the word, "wilful" has a number of different meanings, depending on the context in which it is used. As it is used in the Statute which I have read to you and the one that is involved in this Case, "wilful" means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligent. Mere negligence, even gross negligence, for that matter, is not sufficient to constitute wilfulness. It means an act done with bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately or perversely, with bad motive and with a specific and wrongful intent. In other words a failure to act is wilfully done if done voluntarily, purposefully, and with a specific intent to fail to do what the law requires to be done; that is to say, with bad purpose, either to disobey or bad motive to disregard the law. I Charge you that the only bad purpose necessary for the Government to prove in this Case, is the deliberate intention on the part of the Defendant not to file returns, which the Defendant knew he was required to file at the time he was required by law to file them.

Now, Ladies and Gentlemen of the Jury, the question of wilfulness and intent are matters for you as jurors to determine from all the evidence in this Case, and may be established by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a Defendant does or fails to do, there can be no eyewitness accounts to a state of mind to which acts are done or commit-

ted, but what a Defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. In determining the issue as to wilfulness and intent, the Jury is entitled to consider any statements, if any, made and acts done or admitted by the Defendant, and all of the facts and circumstances and evidence which may aid the determination of the state of mind. Although the Defendant is charged with wilful failure to timely file income tax returns for the years, 1959 through 1963, inclusive, the Court nevertheless permitted evidence, as you will recall, tending to show that the Defendant failed on some other instances to timely file the Federal Income Tax Returns for years before the years mentioned in the indictment; that in some of those years, he timely filed and others, he did not. As I recall the evidence, it is for you, Ladies and Gentlemen, to recall the evidence, and if I should be in error, then your recollection is what you abide by, not mine. But if as I recall, in 1955, 1956 and 1957, I believe the evidence showed that he made timely filings. There's some question about the payments being timely. I do not recall, but as I recall, certain evidence was permitted concerning the filing of the Defendant's income tax returns for the years, 1953 through 1958, and the payment of the tax shown to be due for those years.

Now, I Charge you that such evidence is to be considered by you only insofar as you find it bears upon or relates to the wilfulness and intent of the Defendant in failing to timely file his income tax returns for the years that are set out in the indictment; that is, 1959 through 1963. In other words, such evidence was admitted for the sole purpose of showing or throwing some light upon the state of mind or intent of the Defendant with respect to his failure to timely file his 1959 through 1963 income tax returns, which are the years set out in the indictment and the ones that are in

question here, and you may consider the returns for earlier years for whatever light, if any, you determine they should upon the element of wilfulness and intent. In this connection, however, you are instructed that it is not necessary for the Government to show that any tax is due for either of the years mentioned in the indictment or that any taxes due at the time of the return of the indictment in this Case, since the offense charged is a wilful failure to timely file tax returns for the years that are set out in the indictment; — when the failure to file — when the Defendant was required to do so, that he is to disclose his gross income and deductions to which he was entitled, so that the Government could know the extent of his tax liability. However, you may consider the fact that returns were later filed for the years in question and that the tax shown to be due was paid, along with all the other evidence in the Case in determining whether the Defendant's action in failing to timely file his returns for the years in question, was wilful. You may consider along with all the other evidence in the Case the failure of the Defendant to file for the successive number of years set out in the counts of the indictment in arriving at the state of mind of the Defendant. The Government contends that the failure to file for the years set out in the indictment discloses a pattern of non-filing which bears on the state of mind of the Defendant. You may consider it such, if you find that such is the case, but it is for you, Ladies and Gentlemen of the Jury, to determine what the evidence shows in this Case. Now, I have used the word, "gross negligence." Gross negligence is that degree of negligence which shows an utter disregard of prudence. It's an act or an admission respecting legal duty of an aggravated character, as distinguished from a mere failure to exercise ordinary care. Knowledge and wilfulness, Ladies and Gentlemen of the Jury, are mental elements of a violation of the

type charged in this Case, and it is difficult to prove by direct evidence that an act is done knowingly and wilfully. The existence of such elements may be inferred, however, from acts and conduct, as I mentioned before. It is impossible, as you know, to look into a person's mind and determine what existed at any given time. Knowledge and wilfulness may be inferred from acts, although each act, standing by itself, may seem unimportant. Knowledge and wilfulness are questions of fact to be determined by you from all the circumstances in the Case.

Now, Members of the Jury, the Defendant has made a general denial of the accusation contained in the indictment by his plea of not guilty. You are instructed that an indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the Defendant, nor does it permit any presumption or inference of guilt.

The law presumes a defendant to be innocent of crime, and this presumption continues throughout the course of the trial until you have reached the Jury Room and have reached a conclusion, if you do, that the Government has shown to your satisfaction that the Defendant is guilty beyond a reasonable doubt. This burden does not change at any time during the course of the trial. The presumption of innocence in favor of the Defendant is not a mere formality to be disregarded by the Jury at its pleasure. It is a substantive part of our criminal law.

If the evidence is sufficient to overcome the presumption of innocence, and to convince you beyond a reasonable doubt of the guilt of the Defendant, then it would become your duty to find him guilty, but if you have a reasonable doubt as to his guilt, it would be your duty to give him the benefit of that doubt and acquit him.

As the Court has just stated, the burden of proof is upon the United States, and that is the Government, to prove beyond a reasonable doubt before he can be convicted. Mere suspicion or probability of his guilt, however strong, is not sufficient to convict. The Defendant has no burden to prove his innocence, and you should be careful not to impose that burden upon him.

Now, reasonable doubt, Ladies and Gentlemen of the Jury, is a fair doubt based upon reason and common sense, and arising from the state of the evidence. It is a doubt founded on your sound and reasonable judgment after a consideration of all of the evidence in the Case. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. This does not mean that the prosecution must prove the Defendant guilty beyond any doubt whatsoever, because if this were true there could never be a conviction in a criminal case where a defendant enters a plea of not guilty. A doubt that is engendered solely by sympathy or dislike to accept responsibility for convicting is not a reasonable doubt.

The law does not require absolute certainty, nor does it require absolute certainty, nor does it require proof beyond all possibility of mistake. It does require that after weighing the entire evidence in the Case, you should be satisfied to that degree of certainty that you would be willing to act upon in your own important affairs. Therefore, if, after a fair and dispassionate consideration of all the evidence, you reach a point where you can say upon your conscience and upon your judgment that from the evidence, you are morally certain of the guilt of the Defendant, and that you cannot reconcile the evidence with any reasonable hypothesis of innocence, you will have been convinced beyond a reasonable doubt and you should find the Defendant guil-

ty. But, if upon weighing all the evidence, it does not satisfy your judgment and conscience to that degree of certainty that will enable you to say you are morally certain of the guilt of the Defendant, you should return a verdict of not guilty. Of course, reasonable doubt may arise just as well from a lack of evidence as from the evidence itself, since the law does not impose upon a defendant the duty of producing any evidence. There is no burden on the Defendant to prove his innocence and you are not to impose that burden upon him.

In considering the guilt or innocence of the Defendant, you are to consider only the evidence in this Case. But in your consideration of the evidence you are not limited to the bald statements made by the witnesses. On the contrary, you are permitted, and indeed expected, to show or to draw from facts which you find have been proved beyond a reasonable doubt such reasonable inferences as seem justified in the light of your own experience.

Further, there are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence — the proof of a chain of circumstances pointing to the commission of the offense. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant, the Jury must be satisfied of the guilt of the Defendant beyond a reasonable doubt from all of the evidence in the Case.

Now, Members of the Jury, you as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. While there is no absolute or arbitrary guide or measure by which the Jury shall determine the truthfulness or untruthfulness of a witness, the Court

will point out to you certain general principles which you should consider when you pass upon this phase of this Case.

Among the things which a jury may properly consider in the determination of the credibility of witnesses are whether the witness has any motive or reason for being truthful or untruthful in his testimony, his interest, if any, in the outcome of the Case; whether there has appeared from his attitude or conduct any bias, prejudice or feeling which may cause his testimony to be influenced; whether his testimony bears the earmarks of truthfulness or untruthfulness; and to what extent, if any, it is corroborated or confirmed by other testimony which is not questioned, or to what extent, if any, it is corroborated or confirmed by known or admitted facts. The Jury may also consider the intelligence and mental capacity of a witness, and his opportunity to have accurate knowledge of the matters to which he testified. In other words, the Jury may consider the testimony of the witnesses in connection with all of the facts proven in the Case, and which are apparent, and from them determined the degree of credibility or the degree of believability, if you want to put it that way, that the Jury will give to the witness, and the weight to be given to their testimony.

The Defendant has taken the witness Stand and has testified in his own behalf. As the Court has just stated, it is your duty to scrutinize the testimony of the witnesses to see if they are telling the truth, and of course, if you find that they did tell the truth, you should give their testimony such weight as it deserves. A defendant is interested in your verdict; the Defendant in this Case is interested in your verdict, and naturally, by virtue of that interest, the law contemplates that you will scrutinize his evidence in the light and interest that he has in this Case. Of course, if after scrutinizing his testimony, you find that he has told the

truth. you should give his testimony the same weight as you would any other witness.

Now, another matter that I should Charge you on is that of character evidence. The evidence of the good character of the Defendant has been introduced in this Case. That should be considered by you and given such weight as it is entitled to receive, when considered in the light of all the other evidence. If a person, by his conduct, has built up a reputation for good character, it is a fact which should be considered and the benefit of which should be given to him, but it is only one fact, Ladies and Gentlemen of the Jury, to be considered along with all the other facts, and previous good character should not permit a person to escape conviction of a crime, if, after considering all the facts, including the facts of good character, you are satisfied of his guilt beyond a reasonable doubt.

Now, Members of the Jury, I have not attempted to completely review the evidence in this Case or the contentions of the parties. You will of course decide the Case on the basis of all the evidence and the reasonable inferences to be drawn therefore, whether the Court has called it to your attention or not. Further, if the Court's expressions of the evidence and the contentions of the parties, in the limited manner in which I have done, differ from your recollection, the Court's expressions are to be rejected and effect is to be given to your own understanding, for in the last analysis, the Jury is the sole and exclusive judge of all questions of fact. Such portions of the evidence and such contentions as the Court has called to your attention have been for the purpose of aiding you, not directing you.

If the Court has said or done anything which you may have considered as an indication of the Court's view of the issue of fact in this Case, you are instructed to completely

disregard it. The evidence consists of what the witnesses have been permitted to state to you under oath from the witness Stand together with the exhibits and stipulations which have been admitted as evidence during the progress of this trial. The mere fact that the Court might have asked questions should give no undue weight to anything that has been said. It makes no difference from what source the questions come. You are interested in the answers and not who directed the question. If it has appeared to you that any remark of mine has expressed an opinion concerning the testimony to the credibility of any witnesses or the significance or effect of any of the evidence, I caution you that it will be your right and your duty, in fact, to totally disregard any such remark. I have not expressed nor do I intend to express, nor do I now intend to express or intimate any opinion as to which witnesses are or are not worthy of belief or what inferences should be drawn from the evidence. Remember at all times that you are the jurors and as such, are the sole and exclusive judges of all the questions of fact.

It is the duty of attorneys on each side of the Case to object when the other side offers testimony or evidence which Counsel believes is not properly admissible. When the Court has sustained an objection to a question, the Jury is to disregard the question and may draw no inference from the wording of the question or speculate as to what the witness would have said if permitted to answer. Further, if an objection was sustained after a question was answered, you are to disregard that answer and not consider it in any manner in determining the guilt or innocence of the Defendant.

As you have noted and as I have instructed you, a separate crime or offense is charged in each Count of this indictment. They are five in number. Each offense and the evidence applicable thereto, should be considered separately. The fact that you may find the Defendant guilty or not

guilty of one of the offenses charged should not control your verdict with respect to the other offenses charged.

The punishment provided by law for the offense or offenses charged in the indictment is a matter exclusively within the province of the Court, and is not to be considered by the Jury in arriving at an impartial verdict as to the guilt or innocence of the Defendant.

And finally, Members of the Jury, one further word about your responsibility as jurors. You are not partisans — you are judges — judges of the facts. Your sole interest in this Case and in all cases is to ascertain the truth from the evidence presented.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case, from that in which all reasonable persons treat any question, depending upon evidence as presented to them. You are expected to use your own good common snse. Consider the evidence for only those purposes for which it has been admitted, and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclnations of human beings.

If the accused be proved guilty, say so. If not proved guilty, say so. Keep constantly in mind that it would be a violation of your sworn duty to base your verdict upon anything but the evidence in this Case.

Further, you are to perform your duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy or prejudice. The accused and the Government expect that you will carefully and impartially consider all the evidence, follow the law as stated to you by the Court, — if I am wrong, then it can be later corrected— but you follow the law as I have given it to you and reach a just verdict, regardless of the consequences.

You are instructed that your verdict may be reported only if all of you concur in that verdict — that is, your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto and that your verdict be unanimous. The verdict must reflect the independent and conscientious judgment of each juror. You are further instructed that during your deliberations, each juror should give careful consideration and due deference to the views and opinions of his fellow jurors, and should listen to their arguments with a willingness to be convinced and to yield to their views if induced to believe them correct and such as his conscience would approve, but no juror should yield a conscientious conviction based upon the evidence or lack of evidence merely for the purpose of reaching a verdict. However, when there is a difference of opinion, each juror should examine with candor his own opinion in the light of those of his fellow jurors. If it appears upon such examination that the opinion of a dissenting juror is unsound and not supported by the evidence, such a juror would be justified in yielding to the unanimous opinion of the majority.

DISTRICT COURT'S
REINSTRUCTION OF JURY

THE COURT: Ladies and Gentlemen of the Jury, I regret that it becomes necessary to give you supplemental instructions for the reason that there is always the danger that you will put too much emphasis on the supplemental or additional instruction; but it is your duty to take the instruction; but it is your duty to take the instruction as a whole, and not any particular part of it. I caution you that the instruction that I'm going to give you on the question that you have asked, that you are not to take that out of context with the total instruction, but you will consider it —

the additional or supplemental instruction — in connection with the instructions given you before lunch.

Now, the question is, "Would you please define the word, 'wilfully'?"

Now, this is the instruction, and it is the instruction that I gave you before lunch. Now, the word, "wilful" has a number of different meanings, depending upon the context in which it is used. As it is used in the statute with which we are here dealing, "wilful" means voluntary, purposeful, deliberately and intentionally, as distinguished from accidental, inadvertent, or negligent. Mere negligence, even gross negligence, is not sufficient to constitute wilfulness; it means an act done with bad purpose, or one done without justifiable excuse, or one done stubbornly, obstinate or perversely, with bad motive and with specific and wrongful intent. In other words, a failure to act is wilfully done, if done voluntarily and purposefully and with specific intent to fail to do what the law requires to be done; that is to say with bad purpose either to disobey or disregard the law; that is a definition of "wilfulness" that has, as I understand, been approved in cases of this type; and that is the definition which I charged you, and you will have to abide by it in reaching your verdict. I don't know how much else I can say to you about it. Is there a question about it? All right, you may then retire and continue your deliberation. — Would Counsel want me to state on the record that the objection originally made to the Charge — reiterate it here, or do you want to specifically make an objection?

MR. LOVE: If you please, yes, Sir, that would be sufficient.

THE COURT. Is that all right with you, Mr. Upton?

MR. UPTON: Fine with the Government.

THE COURT: Let the record show that Counsel for the Defendant and for the Government makes the same objections to the main Charge as made originally. These objections are overruled.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1211

SAM L. MACCORKLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 2a–3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1969. (Pet. 1a–2a.) The petition for a writ of certiorari was filed on March 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a speedy trial.
2. Whether the trial court erred in charging the jury.

348-063—69

3. Whether it was an abuse of discretion for the trial court to admit evidence that in the seven years prior to the years in question, petitioner filed returns for three of the years and failed to file returns for four years.

STATEMENT

After a jury trial, petitioner was convicted on all five counts of an indictment charging that he wilfully failed to file income tax returns for the years 1959, 1960, 1961, 1962 and 1963, in violation of Section 7203 of the Internal Revenue Code of 1954 (R. Vol. I, Item No. 2.).[1] It was stipulated that petitioner failed to file timely returns and that his gross income for these years was $21,520.37, $20,993.38, $22,579.76, $22,258.23, and $29,723.43, respectively (R. Vol. I, Item No. 20.). Petitioner was sentenced on Count One to serve four months in custody of the Attorney General, and was given probation on each of the other four counts (R. Vol. I, Item No. 29.). The court of appeals affirmed.

Petitioner testified that he was admitted to the bar in West Virginia in 1940, and that he was practicing law and acting as a County Commissioner of Accounts during the years 1952, 1953 and 1954. He admitted that he failed to file income tax returns for those years until the District Director of Internal Revenue inquired whether he had done so. At that time a Revenue Agent informed him that he could be prosecuted. He then filed delinquent returns and believed he would

[1] "R." references are to the eight volume record certified to this Court by the court of appeals.

thereafter "be checked pretty regularly." (Pet. 32a–36a, 42a–43a, 52a–54a.)

Petitioner also testified that in 1959 he was appointed as Assessor of Kanawha County. His duties included placing valuations on assessable property and he received a salary in the amount of $7,500 per year which was subject to withholding taxes. The balance of his official compensation was from collecting Capitation and Dog Taxes and was not subject to withholding. Petitioner testified that he failed to file income tax returns for the year 1958 because of his involvement in reassessment problems and in primary elections held in April and May of 1959 (Pet. 20a, 23a–25a). He said that he was involved in elections in May of 1960, in 1962 and in April of 1963, and that there was never any time after 1959 when he was not a busy person (Pet. 27a–31a). He testified that he knew he was required to file timely returns during the years 1959 through 1963 but did not do so until a Revenue Agent called on him to inquire about the 1963 return (Pet. 19a, 40a).

Petitioner stated that the problem of filing returns "got bigger and bigger" as it accumulated (Pet. 40a), that he knew he could file returns without paying the tax (Pet. 55a), and that his problem had been to choose between filing his tax returns and doing something else and that he "did something else." (Pet. 24a–25a, 28a, 38a, 58a).

ARGUMENT

1. Petitioner was not denied a speedy trial. In *Ewell* v. *United States,* 383 U.S. 116, 120, 122, this Court stated that the "right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." Although noting that the "delay must not be purposeful or oppressive", the Court in *Ewell* held that a nineteen months delay did not necessarily violate the Sixth Amendment, particularly in view of the defendant's inability to demonstrate any possible prejudice, such as by a loss of evidence or the disappearance of witnesses.

The delay in this case has not been purposeful, oppressive or prejudicial. The first indictment was returned on March 25, 1966, in the Northern District of West Virginia. (R. Vol. I, Item No. 33.) [2]

Petitioner promptly filed a motion to transfer the case to the Southern District of West Virginia, and the district court ordered all further proceedings continued pending consideration of the motion to transfer. (R. Vol. I, Item No. 42.)

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[2] Unlike the case of *Hanrahan* v. *United States*, 348 F. 2d. 363 (C.A.D.C.), cited by petitioner (Pet. 13), the Government here had no choice of venue, as venue for failure to file tax returns is in the district where they should have been filed. *United States* v. *Lombardo*, 241 U.S. 73; *DeCesare* v. *United States*, 356 F. 2d 107, 108 (C.A. 5); *United States* v. *Foster*, 197 F. Supp. 387 (Md.). On November 2, 1966, Congress enacted P.L. 89–713, Sec. 2, 80 Stat. 1108, which amended 18 U.S.C., Section 3237(b) by adding Section 7203 of the Internal Revenue Code of 1954 to the list of offenses wherein a defendant has an unqualified right to remove a prosecution to the district of his residence.

After the case was transferred to the Southern District of West Virginia by order of a visiting judge (R. Vol. I, Item No. 43),[3] petitioner filed, inter alia, a motion to dismiss the indictment on various grounds, including improper constitution of the grand jury and unreasonable delay both before and after return of the indictment. (R. Vol. I, Item No. 37.) The indictment was dismissed on the ground that the grand jury had not been properly impaneled. (R. Vol. I, Item No. 38.)

The second indictment was returned in the Northern District of West Virginia on January 18, 1968, and, on motion of petitioner, transferred to the Southern District. On February 19, 1968, petitioner filed a new motion to dismiss on the ground of unreasonable delay both before and after return of the first indictment. The motion was denied, and the case was tried in July of 1968. (Pet. 5.)

It is apparent that the pace of proceedings after transfer of the first indictment to the Southern District cannot reasonably be questioned. The lapse of time prior to the first indictment was substantial but is nowhere shown to have been oppressive. The methodical investigation and evaluation of criminal tax violations is well publicized and is of substantial value

[3] While the record does not show why the original trial judge disqualified himself, it should be noted that the Chief Judge of the Southern District, who presided over pre-trial motions by consent of the parties (R. Vol. I, Item No. 14), stated that he also would prefer to disqualify himself because of former acquaintance with the petitioner (R. Vol. I, Item No. 46) and it is evident from petitioner's testimony that his active political life would have inevitably created the likelihood of acquaintance with many public officials.

to an individual taxpayer, who has many opportunities to be heard and to show reasons why a criminal charge should not be filed. See *Schlinsky* v. *United States,* 379 F. 2d 735, 737 (C.A. 1), certiorari denied, 389 U.S. 920 (no unreasonable delay where investigation started in 1961 and indictment returned in 1965); *Foley* v. *United States,* 290 F. 2d 562, 565-566 (C.A. 8) (delay not unreasonable where investigation started in 1954 and indictment returned in 1959).

Petitioner's sole defense was that he was faced with conflicting responsibilities and, instead of working on income tax returns, chose to do something else. (Pet. 38a.) The lapse of time has not hindered him in any way in asserting this defense.

2. Petitioner's contention that the trial court erred in refusing to grant certain instructions is without merit.

a. Petitioner's Instructions Nos. 10, 11, 12 and 13 (Pet. 62a–65a) relate to the elements of the offense charged and, with respect to the element of wilfulness, they state that it is essential for the jury to "determine that his motive was evil, and that he failed to file them for some bad purpose."

The trial court's charge did not use the term "evil motive" but informed the jury that the failure to file returns must be "wilfully and knowingly done" (Pet. 74a). The trial court explained thoroughly to the jury (Pet. 75a) that the element of wilfulness involved a "bad purpose."[4] Petitioner's claim (Pet. 22–23) that

[4] The jury were charged as follows on wilfulness:

"Now, the third element is where the controversy is in this Case—the third essential element which the Government is re-

the last sentence of the court's charge on "bad purpose" is contrary to *United States* v. *Murdock,* 290 U.S. 389, is unfounded. In *Murdock* the defendant had been denied any defense based on a good faith mistake as to his duty to answer, whereas here the very sentence which petitioner criticizes states that "bad purpose" requires *knowledge* by the defendant that the law requires him to file the tax returns.

b. Petitioner's Instructions Nos. 3, 5, 6 and 9 (Pet. 60a–62a) relate to reasonable doubt and No. 5 would inform the jury that the evidence must "exclude every reasonable hypothesis of innocence." The trial court carefully explained the concept of reasonable doubt to the jury and advised them that before convicting they

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quired to prove beyond a reasonable doubt, in order to establish the offense charged in the indictment is that the Defendant failed to file the income tax returns within the time required by law; that that failure was wilfully and knowingly—now, the word, "wilful" has a number of different meanings, depending on the context in which it is used. As it is used in the Statute which I have read to you and the one that is involved in this Case, "wilful" means voluntary, purposeful deliberate, and intentional as distinguished from accidental, inadvertent or negligent. Mere negligence, even gross negligence, for that matter, is not sufficient to constitute wilfulness. It means an act done with bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately or perversely, with bad motive and with a specific and wrongful intent. In other words, a failure to act is wilfully done if done voluntarily, purposefully, and with a specific intent to fail to do what the law requires to be done; that is to say, with bad purpose, either to disobey or bad motive to disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this Case, is the deliberate intention on the part of the Defendant not to file returns, which the Defendant knew he was required to file at the time he was required by law to file them."

should be morally certain of petitioner's guilt and certain that they "cannot reconcile the evidence with any reasonable hypothesis of innocence." (Pet. 79a.) Petitioner fails to show any essential difference between his requested instruction and the charge as given. In fact, the trial court's charge that every reasonable hypothesis of innocence should be excluded was more favorable to petitioner than is required. *Holland* v. *United States,* 348 U.S. 121, 139–140; *Samuels* v. *United States,* 398 F. 964, 970 (C.A. 5), certiorari denied, 393 U.S. 1021.

3. There is no merit to petitioner's contention (Pet. 27–28) that his tax returns for 1952–1958 had no probative value and were erroneously admitted as exhibits. The trial court carefully instructed the jury that these returns (showing a failure to file timely returns for 1952, 1953, 1954 and 1958, and the filing of timely returns for 1955, 1956 and 1957) should be considered solely for their bearing on petitioner's "state of mind" and intent.[5]

Petitioner's plea of not guilty put in issue the element of wilfulness. *Hamman* v. *United States,* 340 F. 2d 145, 149 (C.A. 9), certiorari denied, 380 U.S. 977. The timely returns tended to prove knowledge of a duty to file returns. *United States* v. *Ostendorff,* 371 F. 2d 729, 731 (C.A. 4), certiorari denied, 386 U.S. 982. The delinquent returns tended to show petitioner's casual attitude toward discharging that duty. *Gannon* v. *United States,* 244 F. 2d 541 (C.A. 2).

[5] The term "pattern" was used in the trial court's charge solely in summarizing the Government's contention as to the years named in the indictment and the jury was told that this was for them to decide. (Pet. 76a–77a.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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